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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2008

SANTA FE LAND IMPROVEMENT COMPANY, a California corporation,

Petitioner,

vs.

CITY OF BERKELEY, a political subdivision of the State of CALIFORNIA, and the STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION,

Respondents.

Petition for a Writ of Certiorari to The Supreme Court of the State of California

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SANTA FE LAND IMPROVEMENT COMPANY, a California corporation,

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CITY OF BERKELEY, a political subdivision of the State of CALIFORNIA, and the STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION,

Respondents.

Petition for a Writ of Certiorari to The Supreme Court of the State of California

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Petitioner, Santa Fe Land Improvement Company (hereafter referred to as Santa Fe), prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in this cause on March 27, 1980.

OPINIONS BELOW

The opinion of the California Supreme Court (with dissenting opinion) is reported at 26 Cal. 3d 515 (1980). That court's modification of the opinion following petition for rehearing is reported at 26 Cal. 3d 847a (1980). Copies of the opinion and order issuing peremptory writ of mandate of the California Supreme Court, that court's modification

of opinion and denial of Santa Fe's motion for rehearing, the opinion and denial of Santa Fe's motion for rehearing by the California Court of Appeal and the decision of the trial court are included in Appendix B.

JURISDICTION

The opinion and order[1] issuing a peremptory writ of mandate by the California Supreme Court was entered on February 22, 1980. A timely petition for rehearing was denied and judgment was entered on March 27, 1980. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

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1. As more fully detailed in the statement of the case, *infra*, the judgment at issue arose from respondents' filing of a petition for writ of mandamus seeking reversal of the trial court's order granting partial summary judgment in petitioner Santa Fe's favor. Under California law, the granting of a partial summary judgment is a nonappealable interlocutory order. However, in recent years, the California courts have expressly condoned the practice of utilizing an extraordinary writ procedure to seek immediate appellate review of such orders. *Field Research Corp. v. Superior Court*, 71 Cal.2d 110 (1969); *Vasquez v. Superior Court*, 4 Cal.3d 800 (1971).

In providing for this expedited appellate review, the California courts have not distinguished the use of the petition for writ of mandate in this context from the traditional proceeding by way of extraordinary writ. Accordingly, the issuance of a writ of mandamus, along with a written opinion affirming or overruling a trial court's interlocutory order, is *res judicata* as to any further proceedings in which the issues decided thereby are raised. *Dawson v. Superior Court*, 158 Cal. 73 (1910); *Overstreet v. County of Butte*, 57 Cal.2d 504 (1962). Further, the appellate court's decision will be deemed the "law of the case" and must be adhered to throughout the subsequent progress of the litigation at trial as well as the appellate level. *Tally v. Ganahl*, 151 Cal. 418 (1907).

Consequently, the judgment below by California's highest court issuing a peremptory writ of mandate directing the trial court to vacate its order granting partial summary judgment finally resolves the issue of the applicability of the public trust to *all* lands conveyed under authority of the 1870 Act. The fact that the judgment below does not finally dispose of all issues raised by the under-

QUESTIONS PRESENTED

1. Does this Court's decision in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892), impose federal common law limitations upon the power of the states to establish their own rules of property applicable to the disposal of lands beneath navigable of waters?

2. Has the California Supreme Court effected a taking of property without just compensation in violation of the due process clause of the Fourteenth Amendment to the United States Constitution by overruling its own decision in *Knudson v. Kearney,* 171 Cal. 250 (1915), and reimposing the public trust for commerce, navigation and fishing upon lands sold by the state under authority of the Cal. Stats. 1869-70, ch. 388, where *Knudson v. Kearney* had established a rule of property, relied upon by private owners and the state, that such lands had been freed from the public trust and were held in absolute private ownership?[2]

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lying litigation does not detract from the finality of the judgment on the petition for writ of mandate for purposes of review by this Court.

As this Court has recognized on more than one occasion, a decision by the highest state court on an extraordinary writ is a final judgment within the meaning of 28 U.S.C. § 1257:

> ". . . [I]t is settled that a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute. [Citations]." *Detroit & M. R. Co. v. Michigan R. Com.,* 240 U.S. 564, 571 (1916).

Moreover, this Court has consistently applied the standard of finality to judgments on writ proceedings despite the fact that such judgments issue prior to the termination of the primary litigation. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63 (1928); *Pacific Coast Dairy v. Dept. of Agriculture,* 318 U.S. 285 (1942).

2. The California legislature authorized the grants in question by Cal. Stats. 1869-70, ch. 388 (hereafter referred to as the 1870 Act). The California Supreme Court in 1915 held that grants made pursuant to the 1870 Act passed fee title free of the public trust to the private party purchasers. *Knudson v. Kearney, supra.*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent text of Cal. Stat. 1867-1868, ch. 543 and Cal. Stats. 1869-1870, ch. 388 is set forth in Appendix A.

STATEMENT OF THE CASE

Upon California's admission into the Union on September 9, 1850, the state acquired absolute title to the beds of all navigable waters within its boundaries by reason of its sovereignty.[3] These lands included the tide and submerged lands beneath the San Francisco Bay.[4] The ever increasing amount of shipping due to the discovery of gold created a pressing need for developing harbors in the San Francisco Bay. However, the state did not have the resources to develop the needed harbors itself. The legislature therefore adopted a series of waterfront improvement acts applicable

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3. "Act for the Admission of the State of California into the Union," 9 Stat. 452 (1850); *Shively v. Bowlby*, 152 U.S. 1 (1894).

4. "Tidelands" are those lands lying between the ordinary high water mark and the ordinary low water mark. *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10 (1935); *Marks v. Whitney*, 6 Cal.3d 251 (1971). "Submerged lands" are those lands lying below the ordinary low water mark. *U.S. v. California*, 381 U.S. 139 (1965); *Marks v. Whitney, supra.* California received the tide and submerged lands beneath San Francisco Bay by reason of its sovereignty. *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57 (1873).

to various portions of San Francisco Bay[5] which were designed to encourage harbor development by selling certain lands into private ownership. These acts provided for the establishment of a waterfront line at a sufficient depth to permit the approach of vessels once the line became fixed by bulkheading or filling. Waters beyond the bulkhead or waterfront line were to remain navigable waters held by the state in trust for navigational purposes; those behind the line were to be sold into private ownership and rendered useless for the purposes of navigation through future bulkheading or filling. By 1854, the California Supreme Court had held that grants made pursuant to these waterfront improvement acts vested absolute fee title in the private party grantees.[6]

In 1868, the California legislature adopted the Act of March 30, 1868 (Cal. Stats. 1867-1868, ch. 543) creating a state agency known as the Board of Tideland Commissioners which was to establish a waterfront line for the City of San Francisco waterward of the lines that had been created under the earlier acts. The Board of Tideland Commissioners was given complete control over the lands within its jurisdiction and was required to reserve sufficient property for facilities necessary for navigation and commerce after which it was to sell all of the state's interest in the property landward of the waterfront line.

Two years later, the legislature adopted the 1870 Act (Act of April 1, 1870, Cal. Stats. 1869-1870, ch. 388) amending and supplementing the 1868 Act and expanding the authority of the Board of Tideland Commissioners to

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5. Cal. Stats. 1851, ch. 37 (Martinez); Cal. Stats. 1851, ch. 44 (San Francisco); Cal. Stats. 1853, ch. 137 (San Francisco); Cal. Stats. 1855, ch. 187 (Benicia); Cal. Stats. 1867-1868, ch. 216 (Benicia).

6. *Eldridge v. Cowell*, 4 Cal. 80 (1854).

include all lands within five miles of San Francisco. The 1870 Act provided for the establishment of additional waterfront lines not only in San Francisco but also in many of the adjoining areas bordering the bay. The Board of Tideland Commissioners was given discretion to locate the waterfront line in each area in the manner designed to best serve navigation and commerce. The 1870 Act required the Commissioners to make necesary reservations for the purposes of commerce and navigation prior to selling property landward of the waterfront line.

By the mid-1870's, all of the land authorized to be sold by the Board of Tideland Commissioners had been sold to private individuals. The legislative acts authorizing the sales and the grants themselves did not contain any restrictions or deadlines on the bulkheading or filling of the lands sold, although it was contemplated that the lands sold would be bulkhead and filled in time. Much of the downtown waterfront area of San Francisco presently exists on lands originally sold by the Board of Tideland Commissioners. Close to three billion dollars worth of improvements have been constructed on lands granted by the Board of Tideland Commissioners in the cities of San Francisco, Sausalito, Tiburon, Corte Madera, San Rafael, Richmond, Albany, Berkeley, Emeryville, and Alameda.

Petitioner Santa Fe acquired in excess of 600 acres of land in the City of Berkeley during the period between 1930 and 1951 from successors to grantees of the Board of Tideland Commissioners. These lands are the subject of this litigation. Part of Santa Fe's property has been filled and developed over the years. At the present time, a substantial portion of the property has not been filled and still remains subject to tidal action.

In 1915, the California Supreme Court reviewed the effect of grants made under the 1868 and 1870 Acts by the Board of Tideland Commissioners in *Knudson v. Kearney, supra.* In *Knudson v. Kearney,* the court held that the 1868 and 1870 Acts freed the lands sold from the public trust for commerce, navigation and fishing and that purchasers of such lands owned absolute fee title to the property.[7] The decision of the California Supreme Court in *Knudson v. Kearney* became a settled rule of property, accepted and relied upon by private parties as well as the judicial, administrative and legislative authorities of the state for 65 years.[8]

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7. The California Supreme Court stated the following rationale for its decision:

> "It is obvious from the provisions of the aforesaid acts of 1868 and 1870 that they were enacted in aid of navigation and for the purpose of providing for the improvement of San Francisco Bay, so as to make it more suitable for navigation. These acts provided that the boundaries of navigable waters should be fixed and the waterfront line delineated and, in effect, that the land not required for docks, piers, slips, or other purposes of commerce should be subject to sale outright to private persons for private use." *Knudson v. Kearney, supra,* at 253.

8. *Knudson v. Kearney* was followed in *Alameda Conservation Ass'n v. City of Alameda,* 264 Cal.App.2d 284 (1968), *cert. denied* 394 U.S. 906 (1969). In *Alameda Conservation Ass'n,* the state of California occupied the same position as petitioner Santa Fe here and successfully urged that *Knudson v. Kearney* held that lands sold pursuant to the 1868 and 1870 Acts were an absolute conveyance into private ownership.

In *Marks v. Whitney, supra* note 4, the California Supreme Court concluded that the 1868 and 1870 Acts:

> ". . . were enacted in the aid of navigation and for the purpose of providing for the improvement of designated parts of San Francisco Bay and they operated to free such lands from the public trust." *Marks v. Whitney, supra,* at 258,

See also City of Long Beach v. Mansell, 3 Cal.3d 462, 485 (1970); *Atwood v. Hammond,* 4 Cal.2d 31, 41-42 (1935); *Oakland v. LaRue Wharf etc. Co.,* 179 Cal. 207, 213-214 (1918); *People v. Southern Pacific Co.,* 177 Cal. 555, 559 (1918); *City of Newport Beach v. Fager,* 39 Cal.App.2d 23, 29 (1940); *Richmond Wharf & Dock Co. v. Blake,* 39 Cal.App. 1, 4 (1918); *Connell v. McGahie,* 37 Cal.App. 439, 443 (1918); *Koyer v. Miner,* 172 Cal. 448, 451 (1916).

This litigation was commenced in 1972 by Santa Fe and its adjoining landowner George W. Murphy against the City of Berkeley and the State of California to quiet title to 79 acres of land located in the City of Berkeley and to obtain declaratory relief and damages for inverse condemnation.[9] Santa Fe's portion of the 79 acres was part of the 600 acres its predecessors in interest had acquired from the Board of Tideland Commissioners pursuant to the 1870 Act. Santa Fe, relying upon *Knudson v. Kearney,* contended that it owned the property free of the public trust for commerce, navigation and fishing. The city by way of defense claimed that the 1870 Act was ineffective to authorize sale of tidelands free of the public trust for commerce, navigation and fishing by reason of this Court's decision in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892). The state asserted the same defense and also cross-complained, contending that the remainder of Santa Fe's property in Berkeley, which had also been conveyed by the Board of Tideland Commissioners under 1870 Act, was subject to the public trust for commerce, navigation and fishing.

Santa Fe moved for partial summary judgment as to its portion of the original 79 acres. The trial court granted Santa Fe's motion under the authority of *Knudson v. Kearney.*[10] The City of Berkeley and the State of California thereupon sought a writ of mandate from the California

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9. This action and the companion action of *George W. Murphy v. City of Berkeley,* Alameda County Superior Court Action No. 422942, were filed separately. The two actions were later consolidated. Although Murphy was a party to the proceedings before the California Supreme Court below, he seeks no relief here. Since Murphy is not a party to this petition, reference to the proceedings below will only relate to Santa Fe.

10. A copy of the trial court's decision is included in Appendix B.

Supreme Court to compel the trial court to set aside its order.[11]

On February 22, 1980, the California Supreme Court, with three judges dissenting, issued its writ of mandate compelling the trial court to set aside its order granting Santa Fe's motion for summary judgment and ordered the trial court to proceed in accordance with its opinion. The court overruled *Knudson v. Kearney* and held tnat under the *Illinois Central* decision the Board of Tideland Commissioners did not have authority to sell lands free of the public trust and that all lands sold under the 1870 Act, including all of Santa Fe's lands within the City of Berkeley,

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11. The decision of the trial court was rendered April 28, 1977. On September 28, 1977, the City of Berkeley and the State of California sought a writ of mandate from the California Supreme Court to compel the trial court to set aside its decision. The supreme court transferred the writ to the court of appeal which denied the writ without opinion. The city and state thereafter petitioned the California Supreme Court for hearing. On December 22, 1977, the supreme court granted the petition for hearing and transferred the matter to the court of appeal with directions to issue an alternative writ of mandate to be heard before that court. The court of appeal rendered an opinion on June 30, 1978, which concluded that *Knudson v. Kearney, supra,* was dictum and therefore refused to follow it. Relying upon this court's decision in *Illinois Central R.R. Co. v. Illinois, supra,* the court of appeal concluded that the State of California did not have authority to convey the lands in question free of the public trust for commerce, navigation and fishing. On July 17, 1978, Santa Fe petitioned the court of appeal for rehearing, asserting that the decision reimposing the public trust took Santa Fe's property without due process in violation of the Fourteenth Amendment to the United States Constitution and that the court's construction of *Illinois Central* was erroneous. The petition for rehearing was denied. On August 8,1978, Santa Fe petitioned the California Supreme Court for a hearing, which was granted on September 20, 1978. Santa Fe raised the same issues asserted on rehearing, along with others, in the supreme court. The decision from which petitioner Santa Fe seeks a writ of certiorari here is the decision of the California Supreme Court following the granting of Santa Fe's petition for hearing. Under California law, the decision of the trial court was the subject of review and the State of California and City of Berkeley were the petitioners not withstanding the prior appellate proceedings.

were to be impressed with the public trust for commerce, navigation and fishing. The court concluded that its decision would be retroactive as to those lands which had not yet been filled but not as to those lands presently filled. Although the court conceded that its decision would impair the value of Santa Fe's property, it held that overruling *Knudson* was not a taking of property without just compensation because the economic loss to Santa Fe "is clearly outweighed by the interest of the public." *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 535 (1980).

On March 7, 1980, Santa Fe filed a petition for rehearing contending that the California Supreme Court's construction of *Illinois Central Railroad Co. v. Illinois, supra,* was erroneous and that reimposition of the public trust upon unfilled lands sold under the 1870 Act took Santa Fe's property without compensation in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. On March 27, 1980, the court made a minor modification of its earlier opinion and denied Santa Fe's petition for rehearing.

The federal questions raised in this petition were first asserted by Santa Fe in its petition for rehearing filed July 17, 1978, before the court of appeal. The questions were again raised in Santa Fe's petition for hearing before the California Supreme Court filed August 8, 1978. The federal questions presented were reasserted before the California Supreme Court by Santa Fe's petition for rehearing filed March 7, 1980. The opinion of the California Supreme Court concluded that *Illinois Central* establishes limitations upon the ability of California to convey lands beneath navigable waters as a matter of federal law. The contention that Santa Fe's property had been taken in violation of the Fourteenth Amendment to the United States Constitution was rejected almost without discussion because the Cali-

fornia Supreme Court was determined to reimpose the public trust for commerce, navigation and fishing upon Santa Fe's lands.

REASONS FOR GRANTING THE WRIT

1. The California Supreme Court's Construction of Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892), As Establishing Federal Common Law Limitations Upon the Power of California To Authorize Private Ownership of Lands Beneath Navigable Waters Creates An Irreconcilable Conflict With This Court's Decision In State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

In its decision below, the California Supreme Court concluded that this Court's decision in *Illinois Central Railroad Co. v. Illinois, supra,* represents a federal common law limitation upon the power of the state to adopt laws authorizing conveyance of a portion of the lands beneath the San Francisco Bay into absolute private ownership.[12] The California Supreme Court stated:

> "*Knudson* was incorrectly decided even if the court had been justified in concluding that the purpose of the 1870 Act was to promote navigation. *Illinois Central* holds that a state may not grant to private persons tidelands as vast in area as the board was authorized to sell by the 1870 Act." *City of Berkeley v. Superior Court,* 26 Cal.3d 515, 531 (1980).

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12. This Court held in *Illinois Central* that the Illinois legislature had the power to revoke a 1869 grant of the entire Chicago waterfront to the Illinois Central Railroad four years after the grant had been made. In so ruling, this Court held that under Illinois law the title of the State of Illinois to the bed of Lake Michigan was a title held in trust for the public for the purposes of commerce and navigation and that the ability of the State of Illinois to convey the bed of Lake Michigan into private ownership was limited to conveyances which either promoted the interests of the public or could be made without substantial impairment of the public interest in the lands and waters remaining. The Court then concluded that since the grant did not satisfy the foregoing criteria, the Illinois legislature possessed the power to revoke it.

Therefore, the California Supreme Court concluded that the 1870 Act must be construed in a fashion that would not free the lands sold from the public trust for commerce, navigation and fishing and that the court's 1915 decision in *Knudson v. Kearny* must be reversed.

Contrary to the conclusion of the California Supreme Court, there is no federal common law of real property which is applicable here. This Court has recently held that absent an overriding *federal* interest, the laws of the several states determine ownership of lands beneath navigable water and there is no federal common law restriction upon the exericse of that right. *Wilson v. Omaha Indian Tribe,* 442 U.S. 653 (1979).

Santa Fe submits that the decision of the California Supreme Court and its construction of *Illinois Central* is in direct conflict with this Court's decision in *State Land Board v. Corvallis Sand & Gravel Co., supra. Corvallis* reaffirmed the rule of *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845), that under the equal footing doctrine the title of the states to the beds of navigable waters is absolute and is governed by state law. The Court in *Corvallis* quoted with approval from *Weber v. Harbor Commissioners, supra,* at 65-66:

> "Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, *with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper,* subject only to the paramount right [of the United States] of navigation over the waters . . . ." *State Land Board v. Corvallis Sand & Gravel Co., supra,* at 374 (emphasis added).

Thus, this Court has previously concluded that California had the unrestricted power to decide for itself the law applicable to the conveyance of lands beneath navigable waters of the San Francisco Bay and possessed the power to sell some of those lands into absolute private ownership, subject only to the federal government's paramount right of navigation, if it so desired. See *Barney v. Keokuk,* 94 U.S. (4 Otto) 324 (1876); *Hardin v. Jordan,* 140 U.S. 371 (1891); *City of St. Louis v. Rutz,* 138 U.S. 226 (1891); *Shively v. Bowlby, supra.*[13]

California is not unique in providing for private ownership of portions of the beds of certain navigable waterbodies. Many states have comparable laws which were enacted in the belief that each state was free to decide for itself the law applicable to ownership of land beneath navigable waters.[14] Thus, the question presented has great practical importance not only to land owners in California,

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13. The ability of a state to convey beds of navigable waters into private ownership has consistently been held by this Court to be a matter of state law. Thus, in *Shively v. Bowlby,* 152 U.S. 1 (1894), the Court, in an extensive opinion, concluded that grants of land beneath the navigable waters of the Columbia River must be interpreted in accordance with Oregon law and that the Oregon legislature was free to convey such lands into private ownership if it so desired. Similarly, in *Appleby v. City of New York,* 271 U.S. 365 (1926), the Court not only held that the city was empowered to convey water lots beneath the Hudson River into absolute fee ownership, but that having done so, the state legislature and the courts were prohibited by the United States Constitution from later concluding that the grants were not effective to pass fee title.

14. For example, it is not uncommon for state law to provide that private ownership extends to the middle of a navigable lake or stream: Illinois [*City of St. Louis v. Rutz, supra; Hardin v. Jordan, supra*]; Kentucky [*Walker v. Felmont Oil Corp.,* 240 F.2d 912 (6th Cir., 1957)]; Maryland [Md. Nat. Res. Code Ann. § 9-101 *et seq.*]; Mississippi [*Culley v. Pearl River Industrial Commission,* 108 So. 2d 390 (1959)]; Nebraska [*Nebraska v. Iowa,* 406 U.S. 117 (1972)]; South Carolina [*McDaniel v. Greenville Power Co.,* 78 S.E. 980 (1913)].

but also to the owners of the beds of navigable waters in a number of states. If the reasoning of the California Supreme Court is correct and *Illinois Central* represents a federal limitation upon the ability of the states to develop rules of property governing private ownership of the beds of navigable waters, numerous state statutes and vast private land holdings are subject to challenge.

The effect of the decision below upon grants of lands beneath navigable waters in California is representative of the significant impact federal restrictions upon state law will have. Commencing in 1850, California sold tidelands under acts other than the 1870 Act for the development of waterfronts. The State also disposed of fee title free of the public trust to navigable sloughs included within the two million acres of swamp and overflowed lands which it had sold into private ownership following receipt of those lands from the federal government pursuant to the Arkansas Swamp Act. Act of September 28, 1850, 9 Stat. 519 (1850), 43 U.S.C. § 982 *et seq.*[15] Similarly, the California legislature provided by statute in 1872 that upland owners of property adjacent to navigable non-tidal lakes and streams own to the low water mark.[16] All of these statutes have now been called into question by reason of the decision below.

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15. *See* T. Donaldson, *The Public Domain* (1884, reprinted 1970); Cal. Stats. 1855, ch. 151; Cal. Stats. 1858, ch. 235; Cal. Stats. 1861, ch. 356; Cal. Stats. 1861, ch. 352; Cal. Stats. 1863, ch. 397; Cal. Stats. 1867-68, ch. 415. *See also* Act of July 23, 1866, 14 Stat. 218 (1866), 430 U.S.C. § 987; *Wright v. Roseberry,* 121 U.S. 488 (1887); *Tubbs v. Wilhoit,* 138 U.S. 134 (1891).

16. California Civil Code § 830. The California Supreme Court has previously held that Civil Code Section 830 establishes a rule of property providing for a low water boundary between private party upland owners and the state's sovereign claims to the beds of navigable nontidal waters. *Anderson v. Trotter,* 213 Cal. 414 (1931); *Craig v. White,* 187 Cal. 489 (1921). *See also United States*

The decision of the California Supreme Court goes to the heart of a state's power to deal with the beds of the navigable waterways which it received by reason of its sovereignty upon its admission into the union. This Court has previously concluded that *Illinois Central* was merely an expression of Illinois law.[17] The question of whether *Illinois Central* also establishes federal principles which limit the power of the states to deal with lands beneath navigable water has not been addressed by this Court. If *Illinois Central* represents such a limitation, an irreconcilable conflict between the *Illinois Central* decision and the principles of the *Corvallis* line of authorities exists.

This Court has not reexamined the principles it enunciated in *Illinois Central* since it decided that case in 1892. *Illinois Central* has obviously not been considered by the states as a limitation upon their power to authorize private ownership of the beds of navigable waters. As noted above, many states provide for some form of private ownership of portions of the navigable waters within their boundaries. Most of these laws were adopted during the latter half of the nineteenth century when private development and occupation of property was encouraged by the federal government and the various states as being in the public interest. The extent to which waterfront development has taken place since that time is testimony to the success of the endeavor, as well as the substantial reliance upon those rules of property by private parties. The recent change in

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v. Gossett, 416 F.2d 565 (9th Cir. 1969). Nevertheless, the state has challenged those decisions, citing *Illinois Central* and the decision of the court below. The issue is presently pending before the California Supreme Court in *State of California v. Superior Court (Lyon)*, 1 Civ. 45988, and *State of California v. Superior Court (Fogerty)*, 1 Civ. 24035.

17. This Court noted in *Appleby v. City of New York, supra* note 13, that its conclusion in *Illinois Central* was "necessarily a statement of Illinois law." 271 U.S. at 395.

public policy to favor preservation of waterfront lands seeks to reverse the course of the last century. However, some states, such as California, have sought to fulfill their newly perceived public purpose by reacquiring property which they had previously sold into private ownership without payment of compensation by contending that they lacked authority to adopt such laws in the first instance. As exemplified by the action of the California Supreme Court below, this Court's decision in *Illinois Central* has been construed as authority for invalidating state property laws authorizing private ownership of lands beneath navigable waters. Santa Fe submits that this Court's decision in *Illinois Central* has been misconstrued and misapplied and that reconsideration and clarification of *Illinois Central* is called for in light of the significant changes that have taken place since 1892. Certiorari should be granted to define the reach of *Illinois Central* and to harmonize that decision with *Corvallis* and present day conditions.

2. The Decision of the California Supreme Court, By Overruling A Settled Rule of State Law, Has Taken Santa Fe's Property Without Due Process of Law Or Just Compensation.

The California Supreme Court has overturned its own decision in *Knudson v. Kearney, supra,* which has been followed and relied upon by private owners and the state itself for more than 65 years. *Knudson* held that grants made pursuant to the 1870 Act conveyed fee title free of the public trust for commerce, navigation and fishing. The court below, in overruling *Knudson,* has reimposed the trust upon all unfilled lands sold by the Board of Tideland Commissioners. Thus, a rule of property relied upon by landowners for many years has been swept away and property long owned in fee has been impressed with the public trust for commerce, navigation and fishing. Santa Fe submits that this action of the California Supreme Court is in

direct conflict with applicable decisions of this Court and represents a radical departure from accepted due process constraints of the Fourteenth Amendment to the United States Constitution.

Reimposition of the public trust has for all practical purposes destroyed the utility of Santa Fe's property as well as that of other private owners similarly situated.[18] The public trust under California law is a servitude so far reaching that it may be and is utilized to prohibit any private use of lands which are subject to the trust. As the California Supreme Court stated in *Marks v. Whitney, supra* note 4, at 259-260:

> "There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands . . . as open space. . . ."

Thus, Santa Fe's lands, which have now been subjected to the public trust for commerce, navigation and fishing, may be relegated to strictly open space use by the state without the payment of any compensation. Absent the trust, such lands are extremely valuable. Over the years, similar lands granted under the 1870 Act have been improved and are now worth billions of dollars.[19]

Lands which have now been impressed with the public trust by the decision below are no longer susceptible to

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18. Of the 22,299 acres sold by the Board of Tidelands Commissioners into private ownership, 14,447 acres remain unfilled and would therefore be subject to the public trust under the decision below.

19. As noted *supra,* the downtown waterfronts of San Francisco, Sausalito, Tiburon, Larkspur, Corte Madera, San Rafael, Richmond, Albany, Berkeley, Emeryville and Alameda exist on lands sold under the 1870 Act. The lands which were involved in *Alameda Conservation Ass'n v. Alameda, supra,* note 8, now constitute the Oakland Airport and the surrounding commercially developed areas.

private development. For all practical purposes, their entire value has been taken. Santa Fe purchased the lands at issue because they were sold pursuant to the 1870 Act free of the public trust and were therefore available for private use and occupation. The fundamental property right which Santa Fe acquired by purchasing such lands was the right to utilize them and devote them to private purposes. This Court has recently noted that the "right to exclude" the public from privately owned navigable waters represents a property right that cannot be taken without payment of just compensation. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). The right of Santa Fe to own its property free of the state public trust for commerce, navigation and fishing is an equivalent, if not greater, property interest.

The decision below goes beyond the recognized power of state courts to reverse or modify prior decisions. This Court has repeatedly cautioned that "[s]ubstantive rules governing the law of real property are peculiarly subject to the law of stare decisis." *State Land Board v. Corvallis Sand & Gravel Co., supra,* at 381. *Accord, United States v. Title Insurance & Trust Co.,* 265 U.S. 472, 486-87 (1924); *Leo Sheep Co. v. United States,* 440 U.S. 668, 687-88 (1979).

This concept is intimately related to the constitutional guarantees that property will not be taken without payment of just compensation. Thus, where a state either by judicial decision or statute provides that certain grants convey full fee title, the rights of the grantees pursuant to such grants are protected by the Fourteenth Amendment against subsequent changes in law which would deprive them of the rights already acquired under the grant. *See Muhlker v. New York & H. R. Co.,* 197 U.S. 544 (1905); *Hughes v. Washington,* 389 U.S. 290 (1967) (Stewart, J., concurring); *Appleby v. City of New York,* 271 U.S. 365 (1926). In *Leo Sheep Co.*

v. United States, supra, this Court noted the careful scrutiny that will be exercised where the government purports to abolish a long standing rule of property and revoke vested property rights for reasons claiming to be representative of the public interest.

The question is not whether the State of California could have originally adopted a rule of state property law requiring that all grants of lands beneath navigable waters be impressed with the public trust. Nor is the question whether the California Supreme Court in *Knudson v. Kearney* properly interpreted the intent of the California legislature in enacting the 1870 Act. It is whether, after the state supreme court in *Knudson* specifically determined that grants made pursuant to the 1870 Act were made free of the public trust and after sixty-five years of reliance on that decision, can the same court now reverse *Knudson* and retroactively apply its decision in a manner that deprives the recipients of those grants of the valuable property rights they acquired. Certiorari should be granted to determine whether such conduct by a state court, based on its own perception of the public interest, infringes upon federally protected rights and violates the due process clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 18, 1980

Appendix to
Petition for Writ of Certiorari to the Supreme Court of the State of California

APPENDIX "A-1"

Act of March 30, 1868, Cal. Stats. 1867-1868, ch. 543

CHAPTER DXLIII.

An Act to survey and dispose of certain salt marsh and tide lands belonging to the State of California.

[Approved March 30, 1868.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Commissioners to be appointed.

SECTION 1. The Governor of the State shall appoint three persons, who shall constitute a Board of Tide Land Commissioners, and shall hold office for two years from the date of their appointment, and shall have the charge and disposition of all the salt marsh and tide lands belonging to the State of California, situated in the City and County of San Francisco, as hereinafter provided by this Act, and who shall be known and designated in this Act as "the Commissioners."

. . .

Duties of Commissioners.

SEC. 4. The Commissioners shall take possession of all the salt marsh and tide lands, and lands lying under water, to the point that may be established as the water front, situate along the Bay of San Francisco, and situate in the City and County of San Francisco, belonging to the State of California, and have the same surveyed to a point not beyond twenty-four feet water at the lowest stage of the tide, and cause to be prepared two maps of the same, showing the quantity and extent of the property situated as aforesaid, and exhibiting all the municipal subdivisions, streets, alleys, blocks, squares and lots, which lots shall not exceed in area six thousand two hundred and sixty-one and one sixth square feet each. One of said maps they shall retain in their office at San Francisco, and the other they shall file in the office of the State Surveyor. After such

Establishment of a water line front.

preliminary survey the Commissioners, in conjunction with the Governor of the State, the Mayor of San Francisco and the President of the Chamber of Commerce of San Francisco, and who shall be known and designated in this Act as the "State Board," shall meet and by a two thirds vote establish the water line front of San Francisco; but they shall not have power to alter in any manner whatever the water line front of said city north of the terminus of Second street, as established by the Act passed March twenty-sixth, eighteen hundred and fifty-one. After the establishment of the water line front as above provided, the Commissioners shall have all the property lying within the same belonging to the State surveyed, subject to the approval of the State Board, into lots and blocks in accordance with the official map survey of the City of San Francisco, reserving so much thereof for streets, docks, piers, slips, canals, drains, or other use necessary for the public convenience and the purposes of commerce, as in their judgment may be required, and have two maps of the same prepared showing the property as re-surveyed to the water line front, the streets, blocks, reservations, and everything necessary to be shown by such maps; one of which maps shall be filed in the Surveyor-General's office, and the other shall remain in their office at San Francisco;

Survey.

. . .

provided, that nothing in this Act shall be construed to interfere with the collection of dockage and wharfage by the State, nor with the right of the State to construct, adjoining the property granted, such wharves and docks as may from time to time be provided by law; *provided*

Rights reserved to State.

further, that if the two hundred feet herein mentioned for the right of way, or any part thereof, shall at any time be abandoned or cease to be used as such roadway by said companies, then so much thereof as shall be so abandoned or disused shall revert to the State; and *provided* further, that if the said railroad companies, or either of them, shall not, within thirty days of the organization of the Board of Commissioners, notify such Board of the acceptance of the provisions of this donation and grant, the lands herein proposed to be donated and granted to the said company or companies so failing to notify said Board shall be sold at auction, as is otherwise provided in this Act; and in the event said companies, or either of them, shall accept the grant or donation herein made, the same shall be in lieu of all other grants of land made or to be made to the company accepting the same in the City and County of San Francisco at the present session of the Legislature; *provided*, that no part of said land granted or donated to said railroad companies shall be located on any land now in the bona fide possession and occupation of any citizen or citizens of this State.

Sale of State Lands within water line.

SEC. 5. After the Commissioners shall have complied with the provisions of section four of this Act, they shall proceed to sell at public auction, and as hereinafter provided, in some public place in the City of San Francisco, all the right, title and interest of the State of California in and to the property in the lots described in section four. Such sales shall be by lots in accordance with the survey and map provided for in section four of this Act; *provided*, that in all cases where any settler was on the first day of January, A. D. eighteen hundred and sixty-eight, in the bona fide actual possession of any one lot by himself or tenant, and any additional lot in which he shall have had substantial improvements at the time aforesaid, or who had,

Settlers may purchase at appraised value.

within one year previous to the first day of January, A. D. eighteen hundred and sixty-eight, substantial improvements upon any such lot which have been destroyed by fire, the Commissioners may appraise the value of such lot or lots without the improvements, after sufficient sales have been made to furnish a proper standard of value; and at any time within sixty days after such appraisement such settler may purchase such lot or lots by paying twenty-five per cent. of the appraised value thereof at the time of such purchase, and the residue of such appraised value in three equal instalments, in one, two and three years, with interest as hereinafter provided; but the words "substantial improvements," as used in this Act, shall not be construed to mean or include any bridge, wharf, fence, or piles driven in the land, capped or otherwise. Such sale shall be conducted in accordance with and under such rules and regulations as the State Board shall prescribe; and *provided* also, that all sales made under the provisions of this Act, whether at private or public sale, before they shall be deemed complete, shall be approved by the State Board, such approval to be made within sixty days after the report of such sales shall be filed with the State Board. When such sale shall not be thus approved, such lot or lots shall be subject to re-sale by the Board of Commissioners, and the money paid by the purchaser at such disapproved sale shall be returned to him.

Sales to be approved by State Board.

Terms of sale.

SEC. 6. The terms of sale shall be as follows: Cash, in gold coin, twenty-five per cent. payable on the day of sale to the Commissioners; and seventy-five per cent., payable in one, two and three years thereafter, to the State Treasurer at Sacramento. The Commissioners shall receipt to each purchaser for the amount of his payment of twenty-five per cent., stipulating that if within one, two or three years

thereafter he pays the additional seventy-five per cent., together with legal interest, to the State Treasurer at Sacramento, he shall receive a deed from the State of California for the property purchased by him. Notices of sale shall be published in two of the San Francisco daily papers and in one daily paper published at the Capital of the State, for thirty days prior to the day of sale. Such notices shall specify the property to be sold, by its numbers and locality as to streets, and by any other descriptions deemed necessary to inform purchasers, as also the time, place and conditions of sale. The compensation of the auctioneer shall be agreed upon by [the] State Board, and shall not exceed the half of one per cent. on the gross amount of sales.

Notice to be given.

SEC. 7. Upon a sale, and after the payment of the twenty-five per cent. provided in section six, the Commissioners, or a majority of the Board, shall sign and execute a deed of grant and release to the purchaser. Such deed shall convey all the right, title and interest of the State of California in the premises, and shall be prima facie evidence of the regularity of all the preliminary proceedings and sale of the Commissioners, and shall also be prima facie evidence of title and right of possession in the grantee, his heirs and assigns, upon which actions for the recovery of real property or for injuries thereto may be maintained and defended in all the Courts of this State having jurisdiction thereof, which deed shall be forwarded by the Commissioners to the State Treasurer, who, upon the surrender to him of the Commissioner's receipt for the amount paid said Commissioners [and] the payment to him of the additional seventy-five per cent., with legal interest, as hereinbefore provided by this Act, shall deliver the deed to the grantee; and in case of non-compliance with the provisions of this Act on the part of the purchaser, by non-payment

Deeds.

Forfeitures.

of either or any instalment aforesaid, all the money paid by him shall be forfeited and the property considered as unsold by the State.

Priorities of sale.

SEC. 8. The Commissioners shall pay over to the State Treasurer all moneys received by them from sales of property within fifteen days after its receipt. At the close of each sale they shall file with the State Board and State Controller accounts of such sale, showing the amount of money received by them on account of such sale, the number and description of the property sold, the purchaser's name, and other needful information, and shall verify the same under oath.

Sales may be postponed.

SEC. 9. The Commissioners shall have power to adjourn any sale regularly called, from day to day, week to week, or month to month, by public proclamation; in which case, each postponement shall be re-advertised by publication of notice in the same manner as required in section six of this Act; but it shall not be lawful to ordain and call sales at intervals of time less than forty-five days, one sale from another; *provided,* that the Commissioners shall have power at any time during a public sale to pass or discontinue the sale of any property, when they deem such action to be best for the State.

SEC. 10. The cash proceeds of all sales shall be placed by the Treasurer to the credit of the General Fund.

Powers of Commissioners.

SEC. 11. The Commissioners are empowered to employ a competent surveyor, and such assistants as may be necessary, to make the surveys and maps required by this Act; also, to rent for their use a suitable office in the City of San Francisco, the rent of which shall not be more than fifty dollars per month, and to do any other act or exercise any other power necessary to carry out the provisions of this Act.

. . .

APPENDIX "A-2"
Act of April 1, 1870, Cal. Stats. 1869-1870, ch. 388

CHAPTER CCCLXXXVIII.

An Act supplementary to and amendatory of an Act entitled an Act to survey and dispose of certain salt marsh and tide lands belonging to the State of California, approved March thirtieth, eighteen hundred and sixty-eight.

[Approved April 1, 1870.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Powers of Commissioners.

SECTION 1. The Board of Tide Land Commissioners shall have the charge and disposition of all the salt marsh and tide lands lying under water belonging to the State of California, and situate in the City and County of San Francisco, and all the salt marsh and tide lands, to nine feet of water at extreme low tide, within five statute miles of the exterior boundaries of said city and county, as fixed and established in section one (1) of an amendatory and supplementary Act, approved April eighteenth, eighteen hundred and fifty-seven; *provided,* that nothing herein contained shall give said Commissioners any control over the lands heretofore granted to the City of Oakland.

Same.

SEC. 2. Said Commissioners shall have the said lands lying outside the boundary lines of said county and within five miles thereof, as aforesaid, surveyed to a depth of nine feet of water at the lowest stage of the tide, and subdivided into lots of not more than twenty acres or into lots of not less than fifty feet front by one hundred feet deep, as in the judgment of said Tide Land Commissioners, approved by the State Board, may seem fit for the best interests of the State; and the Commissioners shall locate, declare, lay down and establish a canal six hundred feet in width, along and adjoining the southern boundary line of the City and County of San Francisco, extending from the shore line

of the Bay of San Francisco to Ships' Channel, in said bay; also, a canal of like width extending from the mouth of Guadolupe Creek, in the County of San Mateo, in a due east course to the Ships' Channel; and said Commissioners shall have power to locate and establish canals and basins upon the marsh and tide lands lying outside of the exterior boundaries of the County of San Francisco, mentioned in section one of this Act, whenever they deem them necessary for the purposes of drainage, navigation and the wants of commerce; and shall cause to be prepared the necessary maps, exhibiting the property as surveyed, the number, area and location of each subdivision or lot, and all other matters proper and necessary to be shown thereon. The Commissioners shall file certified copies of said maps with the Surveyor-General of the State and with the Recorder of the City and County of San Francisco, retaining the original field notes and maps of said survey in their office at San Francisco.

Sale of lands.

SEC. 3. After the Commissioners shall have complied with the provisions of section two, they shall proceed to sell at public auction, to the highest bidder, on the following terms: Cash, in gold coin, twenty-five percent., payable on the day of sale to the Commissioners; and seventy-five per cent. payable twenty-five per cent. in one year, twenty-five percent. in two years, and twenty-five per cent. in three years, thereafter, to the State Treasurer, at Sacramento. The Commissioners shall receipt to each purchaser for the amount of his payment of twenty-five per cent., stipulating that if the remaining seventy-five per cent. of the purchase money shall be paid in three equal parts—in one, two and three years thereafter, together with legal interest, to the State Treasurer, at Sacramento, he shall receive a deed from the State of California for the property purchased

by him. Such sale shall be by lots, in accordance with the maps provided for in section two of this Act, and on the same terms as provided for in the sale of salt marsh and tide lands, in the Act of which this is amendatory and supplementary to; and the Commissioners shall appoint proper and competent auctioneers to sell said lands, and their compensation shall be one per cent. on the gross amount of sales of all lands outside of the exterior boundaries of said City and County of San Francisco, and one-half of one per cent. on the gross amount of sales of all lands within the boundaries of said City and County of San Francisco, and such sales shall be made in some public place in the city and county aforesaid.

Compensation of auctioneers.

SEC. 4. The State Board, under this Act, shall consist of the Governor of the State, Survey-General of the State and the Controller of State, who shall have power to make all rules for the sales; and before such sales shall be deemed complete, shall be approved by said State Board. Such approvals to be made within sixty days after the report of such sales be filed with the State Board.

State Board.

SEC. 5. The Commissioners, or a majority of them, shall have the power to compromise with any adverse claimants to any portion or portions of lands mentioned in this Act, whenever and on such terms as they may deem it most conducive to the interests of the State; all such compromises to be approved by and with the consent of the State Board and by the advice of the Attorney-General of the State; *provided,* that all such compromises shall be made and in all respects completed, and the money paid, within eighteen months from the passage of this Act, and not afterwards.

Commissioners may compromise.

SEC. 6. All salaries, bills and accounts for expenses incurred in enforcing this Act, shall be approved by the State Board; after they shall have been approved, the

Expenses.

Secretary of the Commissioners shall certify the approval of the same to the Controller of State, who thereupon shall draw his warrants upon the General Fund for the separate amounts of such salaries, bills or accounts, in favor of the parties to whom it is due. The Secretary of the Board of Tide Land Commissioners shall receive, as compensation for his services as Secretary of said Board, the sum of two hundred dollars per month, payable out of the General Fund.

Salary of Secretary.

Costs of deeds.

SEC. 7. The costs and expenses of all deeds required to be made under the provisions of this Act, for the conveyance of such lands purchased by any persons, shall be paid by the purchasers at such sales, not to exceed five dollars for each and every conveyance so required to be made by said Commissioners.

SEC. 8. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

SEC. 9. This Act shall take effect and be in force from and after its passage.

APPENDIX "B-1"
Denial of Petition of Rehearing
(California Supreme Court—
April 22, 1980)

ORDER DUE
April 22, 1980

ORDER DENYING REHEARING

S.F. No. 23686

In the Supreme Court of the State of California
In Bank

CITY OF BERKELEY ET AL., *Petitioner,*
THE SUPERIOR COURT OF ALAMEDA COUNTY, *Respondent*

SANTA FE LAND IMPROVEMENT COMPANY ET AL
Real Parties in Interest.

Opinion modified.

Real Parties in Interest's petition for rehearing DENIED.

Clark, J., Richardson, J., and Manuel, J., are of the opinion that the petition should be granted.

TOBRINER
Acting Chief Justice

SUPREME COURT
FILED
MAR 27 1980
G. E. BISHEL, Clerk
Deputy

APPENDIX "B-2"

Modification of Opinion
(California Supreme Court—
Filed March 27, 1980)

Supreme Court—Filed Mar 27 1980
G. E. Bishel, Clerk

In the Supreme Court of the State of California

S.F. 23686

CITY OF BERKELEY et al.,
Petitioner,

vs.

THE SUPERIOR COURT OF ALAMEDA COUNTY,
Respondent;

SANTA FE LAND IMPROVEMENT COMPANY et al.,
Real Parties in Interest.

MODIFICATION OF OPINION

The opinion herein, appearing at 26 Cal.3d 515, is modified by striking the words "submerged lands" in footnote 3 on page 519 and substituting therefor the word "tidelands," and by striking lines 17 and 18 on page 521, and substituting the following: "the people of each state acquired 'absolute right to all . . . navigable waters, and the soils under them, for their own common use. . . .' (*Martin*". In addition the words "provided that the fill and improvements were made in accordance with applicable land use regulations" on the last two lines of page 534 are eliminated.

APPENDIX "B-3"

Opinion and Order Issuing Peremptory Writ of Mandate (California Supreme Court— Filed Feb. 22, 1980)

1.

SEE DISSENTING OPINION

Supreme Court
Filed—Feb 22 1980
G.E.Bishe
Deputy

In the Supreme Court of the State of California

S.F. 23686

CITY OF BERKELEY et al.,
Petitioner,

vs.

THE SUPERIOR COURT OF ALAMEDA COUNTY,
Respondent;

SANTA FE LAND IMPROVEMENT COMPANY et al.,
Real Parties in Interest.

We are concerned in this case with whether tidelands[1] in San Francisco Bay granted to private parties by the state Board of Tide Land Commissioners (board in the latter part of the 19th century, pursuant to a legislative act passed in 1870, conveyed title to the purchasers free of the public trust for commerce, navigation, fishing, and related uses. Knudson v. Kearney (1915) 171 Cal. 250, and Alameda Conservation Association v. City of Alameda (1968) 264 Cal.App.2d 284, held that these grants were in

1. The term "tidelands," properly speaking, are lands between the lines of mean high tide and mean low tide, whereas "submerged lands" are those seaward of mean low tide and not uncovered in the ordinary ebb and flow of the tide. (City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 478, fn. 13.) For literary convenience, the term "tidelands" will refer to both types of property in this opinion, unless otherwise noted.

fee simple and not subject to the rights of the public. We conclude that these decisions were erroneous and must be overturned, but that tracts of land granted by the board that have been improved or filled are, to the degree hereinafter described, free of the public trust.

Santa Fe Land Improvement Company, a corporation, and George W. Murphy (plaintiffs) each brought an action against the City of Berkeley and the State of California (defendants) to quiet title to 79 acres of land located in the City of Berkeley adjacent to the Berkeley Marina, for declaratory relief, and inverse condemnation. Plaintiffs' predecessors in interest had acquired the parcels from the board by deeds issued puruant to the 1870 act. At the time of acquisition the property was tideland, but all except a small portion has been filled.[2] Plaintiffs alleged that they owned these parcels free of any trust on behalf of the public for commerce, navigation and fishing.

Defendants denied that plaintiffs own the 79 acres in question, and the state filed a cross-complaint,[3] claiming that Berkeley owns the property in fee under a grant from the state,[4] or, in the alternative, that plaintiffs' title is

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2. According to defendants, the fill was placed there by Berkeley some time before 1965 under a garbage disposal program.

3. The cross-complaint was filed by the State Lands Commission, which has jurisdiction over submerged lands owned by the state as well as residual jurisdiction of tidelands granted by the state. (See, e.g., Pub.Res.Code, §§ 6216, 6301.) Section 6308 requires that the state be joined as a party in any action involving title to tidelands granted by the state to a local entity.

4. Berkeley's claim of title stems from statutes enacted in 1913 and thereafter, which granted the state's right to the tidelands within Berkeley's boundaries to the city. (Stats. 1913, ch. 347, § 1, pp. 705-706; Stats. 1915, ch. 534, § 1, pp. 902-903; Stats. 1917, ch. 596, § 1, p. 915; Stats. 1919, ch. 517, § 1, pp. 1089-1091; Stats. 1961, ch. 2180, § 1, pp. 4516-4518; Stats. 1963, First Ex.Sess. 1962, ch. 55, § 1, pp. 343-345.) The city's claim depends upon the extent of the state's interest at the time the grants were made. Our references to the interests of the state or the public in this property apply also to the city's rights.

subject to the public trust. The cross-complaint alleged also that Santa Fe claims 608 acres and Murphy 48 acres of Berkeley's tidelands, comprising 77 percent of that city's entire waterfront, that this additional acreage was, like the 79 acres involved in plaintiffs' complaint, acquired by deeds issued pursuant to the 1870 act, and that Santa Fe asserts that the additional property is also free of the public trust. The cross complaint sought to include the additional acreage in the action.

Plaintiffs move for partial summary judgment as to the 79 acres claimed in their complaints. In support of their motion they produced documents establishing that the property had been conveyed by deeds that the board issued between 1872 and 1875 to their predecessors in interest, granting to them "all the right title and interest of the State of California in and to" the property. The trial court granted the motion, deciding under the authority of *Knudson* and *Alameda Conservation* that the deeds issued by the board terminated the public trust in the properties conveyed. Defendants seek a writ of mandate to compel the trial court to set aside this order.[5]

Although plaintiffs' motion for summary judgment involved only 79 acres, almost all of which have been filled, the trial court's ruling that the conveyances granted by the board were free of the public trust as of the time they were made affects all the grants by the board pursuant to the 1870 act.

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5. The trial court determined also that the state was estopped to claim that plaintiffs' property is free of the public trust because the state took a contrary position in the *Alameda Conservation* case, involving another tract of land conveyed by the board under the 1870 act. We need not dwell on this aspect of the court's ruling. The issue in this case involves a matter of great public importance, and it is settled that the doctrine of collateral estoppel does not apply under such circumstances. (Chern v. Bank of America (1976) 15 Cal.3d 866, 872.)

The City of Berkeley is in Alameda County. It borders on the eastern side of the northern reaches of San Francisco Bay (the Bay), and its boundary includes more than two miles of shoreline and a large submerged area to the west. The 79-acre tract involved in plaintiffs' motion borders on the extension of University Avenue running west of the Eastshore Freeway. Approximately one-third of the tract lies between the 1870 lines of mean high tide and mean low tide, and the remainder was submerged land at that time.

The doctrine that the public owns the right to tidelands for purposes such as commerce, navigation and fishing originated in Roman law, which held the public's right to such lands to be "illimitable and unrestrainable" and incapable of individual exclusive appropriation. (See Note, *The Public Trust in Tidal Areas* (1970) 79 Yale L.J. 762, 763, fn. 7.) The English common law developed similar limitations upon private authority over such property: the rights of the public prevailed over the rights of private persons claiming under tideland grants made by the crown. (See Note, *California's Tideland Trust* (1971) 22 Hastings L.J. 759, 761-762.) After the American Revolution, the federal government acquired "absolute right to all . . . navigable waters, and the soils under them, for [its] own common use . . . ." (Martin v. Waddell (1842) 41 U.S. 367, 410.)

When California was admitted to statehood in 1850, it succeeded to title in the tidelands within its borders not in its proprietary capacity but as trustee for the public. (City of Long Beach v. Mansell, supra, 3 Cal.3d 462, 482; People v. Kerber (1908) 152 Cal. 731, 733; Ward v. Mulford (1867) 32 Cal. 365, 372.) Although early cases expressed the scope of the public's right in tidelands as encompassing

navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state as ecological units for scientific study. (Marks v. Whitney (1971) 6 Cal.3d 251, 259-260.)

There were limitations imposed by this ancient doctrine upon the alienation of tidelands to private parties. Illinois Central Railroad Company v. Illinois (1892) 146 U.S. 387, was the seminal case on the scope of the public trust doctrine and remains the primary authority even today, almost nine decades after it was decided. The decision established the principle that a state, as administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties.

In 1869, the Illinois Legislature granted to the Illinois Central Railroad Company in fee simple 1,000 acres of tide and submerged lands, representing virtually the entire waterfront of Chicago. The only limitations upon the grant were that the railroad company could not authorize obstruction of the harbor or impair the public right of navigation, and that the Legislature retained the right to regulate wharfage fees when docks were built. Four years later, the Legislature thought better of its action and enacted a measure to revoke the grant, an action which was challenged by the railroad.

The court held that the grant was revocable, and that the state could resume exercise of its trust rights at any time. The decision recognized that parcels of land under navigable waters conveyed to private parties for wharves or docks and other structures in aid of commerce may be granted free of the public trust because such uses are consistent with

trust purposes.[6] But it determined that the Legislature did not have the power to convey the entire waterfront of the city to a private party free of the trust. The court declared that one legislature does not have the power to "give away nor sell the discretion of its successors" to "exercise the powers of the State" in the execution of the trust and that legislation "which may be needed one day for the harbor may be different from the legislation that may be required at another day." (See also Mallon v. City of Long Beach (1955) 44 Cal.2d 199, 207; People v. California Fish Co. (1913) 166 Cal. 576, 593.)

The principles of *Illinois Central* have suffered a checkered history in California. Soon after statehood, the Legislature began to sell into private ownership vast tracts of tidelands, often at public auction. In San Francisco Bay, large parcels were sold by deeds purporting to transfer title in fee simple absolute. Many of these transfers were fraudulently made.[7] In 1868, the Legislature created the

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6. The court stated also that "grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining" may also be conveyed free of the trust. (146 U.S. at p. 452.) The meaning of the term "lands and waters remaining" is not clear. The court may have had in mind either former navigable waters which had been filled and were thus no longer useful for navigation, or shoals and swamp lands. In one portion of its opinion, the court quotes from a case in which submerged shoals and flats are characterized as "useless parts" which "really interfered with navigation" and did not "affect the character of the title to the remainder." (*Id.* at p. 457.)

7. For example, pursuant to statutory authority, the Surveyor-General was directed to survey tidelands above low tide for sale at "one dollar per acre in gold coin." County surveyors of San Mateo and Alameda, who conducted the surveys, "unblushingly certified as 'lands above low tide' thousands of acres that lay six to eighteen feet below the waters of San Francisco Bay . . . [F]iles of the state Surveyor-General contain no correspodence indicating that the incumbent ever refused" patents applied for by the surveyor of Alameda County. (See Scott, Future of S.F. Bay (1963) Inst. of Gov. Studies, U. of Cal., p. 4; see also Debates and Proceedings, Cal. Const. Convention 1878-1879, pp. 1038-1039, 1478-1481.)

Board of Tide Land Commissioners. It was directed to take possession of marshland, tideland and submerged land in the City of San Francisco, to establish a waterfront line for the city, and to sell lots within that line, reserving parcels for certain purposes. (Stats. 1867-1868, ch. 543, §§ 1, 4, 5, pp. 716-720.) The territorial jurisdiction of the board was extended by a supplementary act in 1870. (Stats. 1869-1870, ch. 399, §§ 1, 2, 3, pp. 541-542.) The property involved in this proceeding was conveyed by board deeds under its extended jurisdiction. The history and content of these measures will be discussed in further detail, *infra.*

The widespread abuses in the disposition of tidelands led to the adoption in 1879 of article XV, sections 2 and 3 of the Constitution (now art. X, §§ 3 & 4). These provisions prohibit the sale to private persons of tidelands within two miles of an incorporated city, and state that no individual may obstruct the free navigation of tidelands on navigable waters nor the right of way to such waters, when required for a public purpose. In the debate that preceded adoption of the measure, one legislator observed that in the preceding 25 years the grants by the state had nearly resulted in "the monopolizing of every frontage upon navigable waters in this state . . . by private individuals . . . ." (Debates and Proceedings, Cal. Const. Convention 1878-1879, *op cit.,* at p. 1481.)

As a result of these open-handed policies, today almost one-quarter of the Bay is claimed by private persons. Of the remainder, approximately one-quarter has been granted by the state to cities and counties, the state owns about one-half, and the federal government 5 percent. (S.F. Bay Plan Supp., Bay Cons. & Dev. Com., p. 447.)

Two distinct rules developed with regard to the validity of the grants of tidelands made to private parties before

the limitations on alienation imposed by the Constitution of 1879. Even before *Illinois Central* was decided, it was recognized in California that the state had the authority as administrator of the trust on behalf of the public to dispose absolutely of title to tidelands to private persons if the purpose of the conveyance was to promote navigation and commerce. (See, e.g., Eldridge v. Cowell (1854) 4 Cal. 80, 87.) In a series of statutes sometimes called "special acts" the harbor of San Francisco was created: a waterfront line was fixed at a point which reached a depth convenient to shipping, lots and streets were laid out in the water landward of the line and were sold to private parties; these lands were filled, and the line thus formed became the harbor line. Much of San Francisco's downtown business district is situated on land filled in connection with the development of the harbor created pursuant to these acts.[8] From the early days of statehood, it was held that conveyances made pursuant to such a program passed title free of the public trust. (See, e.g., Eldridge v. Cowell, supra, 4 Cal. 80, 87; Ward v. Mulford, supra, 32 Cal. 365, 372-373; Oakland v. Oakland Water Front Co. (1897) 118 Cal. 160, 184-185; see People v. California Fish Co., supra, 166 Cal. 576, 585.)

But conveyances of tidelands to private parties not made for the furtherance of navigation or commerce did not pass title free of the trust. The acts authorizing such conveyances are sometimes referred to as "general acts." *California Fish,* which contains a comprehensive analysis of

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8. Contrary to plaintiffs' claim, the 1868 act did not authorize the sale of property that now constitutes the downtown business district of San Francisco. These grants were made under prior statutes (e.g., Stats. 1851, ch. 41, §§ 1, 3, 4, pp. 307-309; Stats. 1853, ch. 160, §§ 5, 7, pp. 220-221), and absolute title to the lands conveyed by these measures was confirmed by early cases (e.g., Eldridge v. Cowell, supra, 4 Cal. 80, 87).

the public trust doctrine, recognized this distinction. The effect of the decision was to retain the public's right in vast grants of tidelands purportedly conveyed in fee between 1855 and 1872 to private parties by legislative authorization.[9]

In *California Fish,* as here, private claimants asserted that they owned title to tidelands free of the public trust. The court, after recognizing that absolute title could be granted to private individuals in order to "adapt the land to the use for navigation in the best manner" (166 Cal. at p. 597), held that the grants there involved were not made to improve navigation. In these circumstances, the grantees "own the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and controller of these public uses and the public trust therefor, to enter upon and possess the same for the preservation and advancement of the public uses and to make such changes and improvements as may be deemed advisable for those purposes." (*Id.* at pp. 598-599.)

The court set forth the following principles regarding the interpretation of statutes authorizing the granting of

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9. Almost a dozen statutes authorizing grants of tidelands were consolidated in 1872 in Political Code sections 3440 through 3493½. Tidelands conveyed under these statutes excluded areas located within five miles of San Francisco, as well as other areas of the Bay. (Stats. 1861, ch. 356, § 1, p. 383.) Thus, the *California Fish* decision did not affect tidelands included in the 1868 and 1870 acts involved in the present proceeding.

The tidelands conveyed pursuant to the statutes involved in *California Fish* included "the entire sea beach from the Oregon line to Mexico and the shores of every . . . inlet, estuary, and navigable stream as far up as tide water goes and until it meets the lands made swampy by the overflow and seepage of fresh water streams." (166 Cal. at p. 591.) Perhaps 80,000 acres of tidelands (as distinguished from submerged lands) were conveyed to private parties before *California Fish* was decided. (See Taylor, *Patented Tidelands: A Naked Fee?* (1972) 47 State Bar J. 420, 421.)

tidelands: "[S]tatutes purporting to authorize an abandonment of . . . public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation." (*Id.* at p. 597.)

The first focus of our inquiry, therefore, is whether the act of 1870, which authorized the sale of tidelands to plaintiffs' predecessors in interest, had as its purpose the promotion of navigation, commerce or fisheries.

We begin with the 1868 act. The statute directed the board to establish a waterfront line for San Francisco south of Second Street, divide the property within that line into blocks and lots, reserving space for streets, docks, slips, canals, or other uses necessary for the public convenience and the purposes of commerce, and to sell the state's right, title, and interest in the lots at public auction. (Stats. 1867-1868, ch. 543, §§ 1, 4, 5, pp. 716-720.) The 1870 statute, which was "supplementary to and amendatory of" the 1868 act, added to the board's jurisdiction all tidelands within five miles of the exterior boundary of San Francisco to nine feet of water at extreme low tide. As to these tidelands, the board was authorized to subdivide the property into lots and to sell them at public auction, reserving canals and basins that it deemed necessary for drainage, navigation and commerce. (Stats. 1869-1870, ch. 399, §§ 1, 2, 3, pp. 541-542.) At that time, the boundary of San Francisco extended a considerable distance into the waters of the Bay. (S.F. Bay Plan Supp., Bay Cons. & Dev. Com., supra, p. 432.)

The 1870 act therefore increased the territory subject to the board's jurisdiction substantially; the tidelands that the board was authorized to convey under the 1870 act were far greater than under the 1868 statute.[10]

The total acreage placed under the board's jurisdiction under the 2 acts was 56,400 acres of tideland or 88 square miles of the Bay. Of this, the board conveyed 22,299 acres. The area sold pursuant to the 1870 act exceeded many times that conveyed in the City of San Francisco under the 1868 act. Roughly 14,447 acres, or 24 square miles, constituting 64.8 percent of the area under the board's jurisdiction, is still tideland. About 4,186 acres of the subdivided tidelands (18.8 percent) have been filled but not improved, and 3,666 acres (16.4 percent) are both filled and improved with structures. These conveyances extend from Hamilton Air Force Base and Richmond in the northern part of the Bay to San Bruno and San Leandro in the south. In Berkeley,[11] the board sold all the lots extending to 12 feet at ordinary high tide from the shore, granting to the purchasers the entire 2½ miles of the city's waterfront, without any provision for public access. Most of the tidelands in Berkeley are now owned by plaintiff Santa Fe. Of the 854 acres in Berkeley sold under the act, 525 are still under water. In other areas, such as Sausalito, canals providing public access to the Bay were reserved from sale. Over the years, most of the lots sold by the board have been acquired by a relatively small number of corporations that own substan-

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10. Tidelands previously granted by the Legislature to the City of Oakland were excepted from the terms of the 1870 act. (Stats. 1869-1870, ch. 399, § 1, p. 541.)

11. Berkeley was not incorporated as a city in 1870, but there was some community development at the site, including a wharf. (See Bowman, *The Birthdays of Urban Communities* (1952) 31 Cal. Hist. Soc. Q. 328-332.)

tial parcels purchased from the original grantees or their successors. (Scott, Future of S.F. Bay, *op. cit.*, p. 7.)[12]

We come, then, to Knudson v. Kearney (1915) 171 Cal. 250. That case involved an action to quiet title to less than two acres of tidelands on the shore of San Francisco Bay. The plaintiff, characterized by the trial court as an intruder, occupied a parcel that defendant leased from a party who had obtained the property under a deed issued to her predecessor in interest under the 1870 statute. Plaintiff objected to introduction into evidence of the original deed on the ground that the state had no power to convey absolute title to tidelands, citing *California Fish.*

The court, in a discussion that covered less than two paragraphs, held that the plaintiff's assertion was without merit because deeds issued under the 1870 act conveyed

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12. Scott states: "The names appearing on the books of county assessors are for the most part those of large realty syndicates, banks, title insurance companies, investment houses, railroads, and manufacturing companies. Only in the upper arm of Richardson Bay and the water areas around Strawberry Point, in Marin County, are there still many small owners—two dozen or more. Almost the entire waterfront of Sausalito has been consolidated in recent years by a single syndicate. Just seven owners now control the submerged properties in Corte Madera Bay, among them the Marin Title Guarantee Company, the Utah Construction and Mining Company, the Wells Fargo Bank, and the City Title Company. Less than a score of owners pay taxes on the parcels the state originally sold in San Rafael Bay. On the eastern side of the bay the Santa Fe Railroad has title to almost all the privately held tide and submerged lands from Richmond to Oakland, and in Richmond alone it owns 1,156.13 acres. The Standard Oil Company possesses more than a thousand acres of offshore properties in Richmond, and claims title to another 640 acres. Along the northern waterfront of San Mateo County the privately held areas covered by the waters of the bay belong to such interests as the Southern Pacific Railroad, the Schilling Estate Company, the Western Title Insurance and Guarantee Company, the Crocker Land Company, Consolidated Western Steel Corporation, and the Utah Construction and Mining Company, not to mention the Ideal Cement Company and the thousands of acres it claims in the south bay."

absolute title to the grantees. It distinguished the general disposition statutes involved in *California Fish* on the ground that whereas those statutes were not designed to promote navigation, it was "obvious" from the provisions of the 1868 and 1870 measures that they were enacted for that purpose. The *Knudson* opinion states, "These acts provided that the boundaries of navigable waters should be fixed and the waterfront line delineated, and, in effect, that the land not required for docks, piers, slips, or other purposes of commerce should be subject to sale outright to private persons for private use. Reference is made in the opinion in People v. California Fish Co., 166 Cal. 576, 585 . . . to the disposition by the state, under these and other similar statutes, of tidelands cut off from navigation by the fixing of the waterfront of San Francisco. Many decisions are cited which either declare or assume that grants under such laws convey the title in fee. [Citations omitted.] Deeds made under the authority of these and similar acts do not come within the scope of the decision in the California Fish Co. case . . . ." (171 Cal. at p. 253.)

Knudson was followed in *Alameda Conservation* in which it was held, without any independent analysis, that tidelands in Alameda conveyed pursuant to the 1870 act were granted free of the public trust.[13]

While it would render our problem much simpler, we cannot agree with defendants' view that the statement in *Knudson* that grantees who acquired title under the 1870

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13. In two recent cases this court referred to *Knudson*. City of Long Beach v. Mansell, supra, 3 Cal.3d 462, 485, footnote 20, merely cites the case, but Marks v. Whitney, supra, 6 Cal.3d 251, 258, footnote 6, states that the 1868 and 1870 statutes "were enacted in aid of navigation and for the purpose of providing for the improvement of designated parts of San Francisco Bay and they operated to free such tidelands from the public trust. [Citing *Knudson* and *Alameda Conservation.*]"

statute took free of the public trust constitutes dictum. Even if the court could have based its decision on a narrower ground, it chose not to do so, and this determination was the sole ground for its decision. In these circumstances it cannot be said that the statement was only a general expression of opinion not necessary to the discussion, and therefore dictum. (Achen v. Pepsi-Cola Bottling Co. (1951) 105 Cal.App.2d 113, 124-125; see also Weeden v. Tayokichi Yamada (9th Cir. 1925) 4 F.2d 455, 456-457; Stockton v. Rattner (1972) 22 Cal.App.3d 965, 969.) We must squarely face the problem created by *Knudson.*

In assessing that decision, we note at the outset that the action was between two private persons over less than two acres of tidelands, and that the state was not a party to the action as a representative of the people's interests in the vast areas of tidelands alienated by the board. An examination of the original record in the case reveals that the tideland trust was barely mentioned by the parties in the total of 19 pages of briefs filed by them, although there were some obscure references to the people's interest in tidelands in the printed oral argument. The court's conclusion on the basis of this meager presentation that the Legislature intended by the 1870 statute to authorize the board to sell to private parties free of the public trust more than 56,000 acres of tidelands requires reexamination. So far as we are aware, the present case is the first in which a detailed inquiry into the history and purpose of the 1870 act has been undertaken.

Our analysis convinces us, for the reasons set out below, that *Knudson* and *Alameda Conservation* are incorrect. In our consideration of this question, we proceed on the basis of the principles expressed in *California Fish:* statutes purporting to abandon the public trust are to be strictly

construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation.

The first defect of *Knudson* is that it relied upon the terms of the 1868 act to justify a conveyance made under the 1870 statute. While the former made provision for a waterfront line in San Francisco and reserved streets, docks and other facilities for commerce and navigation, the latter directed the board to convey into private ownership tidelands within five miles of the San Francisco line to nine feet at extreme low tide, reserving only such canals and basins as the board considered necessary for drainage, navigation or commerce. The *Knudson* court relied almost entirely on the language of the 1868 act to justify its conclusion that grants made under the very different language of the 1870 statute were free of the public trust. Certainly, it could not be said that the 1870 act was designed to promote harbor development. It allowed the board to grant the entire waterfront of every community along a substantial portion of the Bay to private persons in fee, without reference to whether or not a harbor would be desirable or possible at any particular point.

Nor is it "obvious," as the court opined, that the 1870 act was designed to improve navigation on the Bay. The statute makes no reference to a specific public improvement to promote navigation, and does not state the improvement of navigation as its purpose. The fact that the word "navigation" is used in the act and that some of the lands within the board's jurisdiction could be withheld from sale for canals and basins needed for navigation is clearly insufficient to justify the conclusion reached by the court. What

is required and is missing from the act is a clear intent expressed or necessarily implied that the purpose of the act was to further navigation or some other trust use. In *Illinois Central* the fact that the grant to the railroad prohibited it from impairing the right of navigation did not prevent the United States Supreme Court from holding that the conveyance violated the trust.

Confirmation that the grants were not intended to be free of the public trust is provided by legislative history. The Attorney General advised the Legislature prior to the enactment of the 1868 statute that the public would retain its right to the tidelands conveyed under the act. In a letter of advice attached to the report of the committee appointed to study the measure, the Attorney General wrote: "The State, in making this disposition [of tidelands], passes the title with the same disability which obtains with the State. Her purchaser can acquire from the State no such title as will enable the owner or holder of them to use them to the detriment, destruction or prejudice of commerce or navigation. For such uses the public have an easement, and the Government retains and has the authority to enforce the right." (Rep. Assem. Special Com. in Relation to S.F. Tide Lands, 2 Appendix to Sen. and Assem. J. (1866-1867) p. 6.)[14] Moreover, there is evidence that the Legislature may have been primarily motivated by a desire to raise revenue rather than to improve navigation. The committee's report

14. Plaintiffs argue that the use of the word "Government" in the Attorney General's advice letter indicates that he was referring to the federal government's right to regulate obstructions to navigation rather than the state's power to alienate tidelands free of the public trust. We doubt the correctness of this argument in view of the language quoted above. In any event, it cannot be said that the construction urged by plaintiffs is compelled by the language of the Attorney General. In view of the rules of construction referred to above, we must adopt the interpretation that favors retention of the public trust.

to the Legislature before the 1868 act was passed, as well as reports by the Governor to the Legislature and by the Attorney General to the Governor regarding the progress of the disposition program, refer only to the funds that would be or had been realized from the sales authorized by the act; they are devoid of any reference to the improvement of navigation.[15] Presumably, the Legislature which

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15. The committee report recommending passage of the act states in part, "There is quite a considerable tract of land of the character referred to in this bill within the limits of the City and County of San Francisco—that former legislative bodies of this State, within the past few years, have made large grants of the most valuable portions thereof to associations at nominal price, by which the State has received but slight benefit . . . . [The bill] proposes, to the greatest extent that is possible, by sales in small tracts, to protect the interest of the State at large and render contribution from that source to the General Fund . . . . The undersigned, of your Committee, are fully impressed with the belief that some disposition should be speedily made of the State's interest in the lands referred to in this bill, that they may be improved and made a productive, tax-paying estate, from which the State would derive large acquisitions to her revenue." (Rep. Assem. Special Com., *op. cit.*, pp. 3-4.)

An attorney, Creed Haymond, had been retained by the committee to give his opinion on certain legal issues with regard to the measure. The committee requested him to render an opinion on the merits of the bill. In a letter attached to the committee's report, he stated, "If rumor is to be credited, these lands have been a fruitful source of corruption and have been made the foundation of gigantic lobby schemes—the State has been despoiled of her interest in valuable portions of them, and the time has arrived that an end should be put to schemes that grow out of their retention by the State. Whilst the Legislature has the power to give them away lot by lot to private parties, it has not the moral right to so dispose of them. Our State is burdened with a debt of five millions of dollars and the people are weighed down by taxation.

"If these lands are sold under the provisions of the . . . bill, the State will receive into her Treasury more than a million of dollars. That sum applied to the redemption of State bonds will not only improve the credit of the State, but enable the Legislature to materially reduce taxation—a consummation most devoutly to be wished for." (Rep. Assem. Special Com., *op cit.*, p. 10.)

The Attorney General, in his annual report to the Governor, stated:

amended and supplemented the 1868 statute in 1870 was aware of the committee's report and some of the additional matters referred to above. While this evidence of legislative intent is not determinative, at the very least it reinforces our conclusion that the 1870 statute may and should be interpreted to preserve the public's rights in the tidelands that it authorized the board to convey to private parties.[16]

Knudson was incorrectly decided even if the court had been justified in concluding that the purpose of the 1870 act was to promote navigation. *Illinois Central* holds that a state may not grant to private persons tidelands as vast in area as the board was authorized to sell by the 1870 act.

"I congratulate your Excellency and the people of the State upon the success of the plan devised at the last session of the Legislature (Act approved March 30th, 1868, Statutes 1867-8, pages 716 to 722, inclusive) for the sale and disposition of the State's interests in certain salt marsh and tide lands bordering upon the Bay and within the City and County of San Francisco. Up to the present time, notwithstanding the unprecedented stringency of the money market, the sales of these lands, under the provisions of the Act, amount to the sum of eight hundred and thirteen thousand one hundred and eight dollars and seventy-four cents ($813,108.74), leaving a large part of the most valuable of those lands still to be sold. I am well assured that the sums which have been and will be hereafter realized from this source (even after paying the sum of two hundred thousand dollars to the University Fund) together with the sums accruing from the ordinary sources of revenue, will, with proper economy, within a short time extinguish the State debt, thereby placing the credit of our State where it of right belongs—amongst the first in the Union, and by reason of light taxation and a State unincumbered with debt, enable us to hold out increased inducements to immigration." (1 Appendix to Sen. and Assem. J. (1867-1869) Rep. of Att. Gen., p. 6.)

Governor Haight similarly emphasized the monetary benefit of the sales in his remarks to the Legislature in December 1869. (Sen. J. (1869-1870) Governor's Message, pp. 40, 51.)

16. The matters set forth above regarding the Legislature's intent apply to both the 1868 and 1870 enactments. Nevertheless, there can be no doubt that the promotion of harbor development may be more readily inferred from the language of the earlier statute. We are directly concerned in the present case only with the meaning of the 1870 act, and our holding applies only to it.

Such action amounts to an improper abdication by the state of its role as trustee on behalf of the people.

Moreover, *Knudson* was decided in 1915, 40 years after the grants were authorized. Since a very substantial percentage of the tidelands conveyed under the act had not been filled during the intervening years, any program for harbor development or the improvement of navigation had not been realized. *Illinois Central* makes it clear that one legislature may not sell the discretion of its successors to exercise the state's power as the trustee of tidelands. *Knudson* clearly violated this admonition by holding that the trust was terminated as to these tidelands even though 40 years after the grants were made, the plan for improving navigation, which was the purported purpose of the 1870 statute, had not been fulfilled. (See Comment, *The Tideland Trust* (1974) 21 UCLA L.Rev. 826, 844-847, fn. 90, 93.) As to the status of these tidelands at the present time, the McAteer-Petris Act, passed in 1965 (Gov. Code, § 66600 et seq.), a statute enacted in the state's capacity as trustee of the tidelands (see People ex. rel. S.F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal.2d 533, 544-549), demonstrates that the Legislature's current policy regarding these lands is different from that expressed by the 1870 act.

Finally, a number of cases had held or stated long prior to *Knudson* that a grant of tidelands, even if made for the improvement of navigation, does not vest absolute title in a private party until the improvements are actually made. (See, e.g., People v. Williams (1884) 64 Cal. 498, 499; People v. Kerber, supra, 152 Cal. at pp. 736-737; *California Fish,* supra, 166 Cal. at pp. 599-600; see also Comment, supra, 21 UCLA L.Rev. 826, 844-847, fn. 90, 93.) Since no program of improvement was realized, *Knudson's* holding was in error on this ground also. Thus, under every ra-

tionale, *Knudson* is clearly incorrect, and the opinion is overruled. *Alameda Conservation* is disapproved insofar as it follows the holding of *Knudson.*

Our conclusion is made with due recognition of the special role of the "rule of property" in the application of the doctrine of stare decisis. As explained in Abbott v. City of Los Angeles (1958) 50 Cal.2d 438, 456-457, the doctrine relates to a "settled rule or principle, resting usually on precedents or a course of decisions, regulating the ownership or devolution of property . . . . [D]ecisions long acquiesced in, which constitute rules of property or trade or upon which important rights are based, should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one, inasmuch as uniformity and certainty in rules of property are often more important and desirable than technical correctness. Thus, judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, as where the evils of the principle laid down will be more injurious to the community than can possibly result from a change, or upon the clearest grounds of error." (See also County of L.A. v. Southern Cal. Tel. Co. (1948) 32 Cal.2d 378, 392-393.)

There are "most cogent reasons in the present case for our determination to overturn *Knudson* and *Alameda Conservation.* We do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the 1870 act will, like the grantees in *California Fish,* hold it subject to the public trust. The *Knudson* decision in 1915 and *Alameda Conservation* 53 years later were the only cases holding that the grants in issue were free of the public trust, and it was apparent from the face of the *Knudson* opinion that although the public's right to large

tracts of tidelands in the Bay was at stake, the state as trustee of those rights was not a party to the action. The summary and conclusionary nature of the decision of the issues in *Knudson,* virtually devoid of reasoning, undermines its status as substantial authority. Finally, these decisions have not been overturned on some minor technicality: to the contrary, our conclusion is based on a studied analysis revealing that they are wholly in error, failed to follow prior law on the subject, and misinterpreted the Legislature's intention. (See Hart v. Burnett (1860) 15 Cal. 538, 597-612; Brekke v. Crew (S.D. 1920) 178 N.W. 146, 154.)

Hart overturned a "rule of property" affecting the City of San Francisco's "magnificant endowment" in public lands acquired when the city was incorporated. The court's justification for its action is particularly appropriate here: "Must we persevere in these errors, no matter how great, or how much opposed to justice they may be, even after new lights, new authorities, and new laws are brought to our notice, proving these mistakes beyond a doubt? We cannot believe that any Court would sustain such a doctrine respecting its decisions." (15 Cal. at p. 611.)

The consequences of allowing the patently erroneous decisions to stand in the present case would be to deprive the people of the state of full control over many thousand acres of tidelands acquired by them at the time of statehood. In these circumstances, and with the limitations upon reassertion of the public's trust rights which we outline below, we do not doubt that it would be more injurious to the public interest to perpetuate the error of *Knudson* and *Alameda Conservation* than to overturn those decisions.

Finally, we reach a crucial question: whether to give our determination full retroactive effect. We note in this con-

nection that *California Fish,* decided in 1913, involved grants of tidelands purportedly in fee to private parties, authorized by almost a dozen different statutes enacted between 1861 and 1872. The extent of the lands involved in that case was far greater than those authorized for sale by the 1870 act (see fn. 9, *ante*), and presumably the improvements made by the grantees were substantial. Yet in that case our court did not hesitate to hold the conveyances were subject to the public trust. Of course, any improvements made on such lands could not be appropriated by the state without compensation. (*Illinois Central,* 146 U.S. at p. 455; Pub. Resources Code, § 6312.)

We could, like the court in *California Fish,* declare that all grants made under the 1870 act are subject to the public trust, or we could hold that our decision is prospective only. We reject both these alternatives. The first would reduce the value of investments that may have been made in reliance on the decisions we overturn, without necessarily promoting the purposes of the trust; while the second would render our holding in this case an academic exercise, because the grants were made more than a century ago.

We choose, instead, an intermediate course: the appropriate resolution is to balance the interests of the public in tidelands conveyed pursuant to the 1870 act against those of the landowners who hold property under these conveyances. In the harmonizing of these claims, the principle we apply is that the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes.

In keeping with this principle, we hold that submerged lands as well as lands subject to tidal action that were conveyed by board deeds under the 1870 act are subject to the public trust. Properties that have been filled, whether or

not they have been substantially improved, are free of the trust to the extent the areas of such parcels are not subject to tidal action, provided that the fill and improvements were made in accordance with applicable land use regulations.[17] Tidelands that have been neither filled nor improved are not only the most suitable for the continued exercise of trust uses, but because there is only a remote likelihood that these parcels may be filled (see 33 U.S.C. § 401 et seq.; Gov. Code, § 6600 et seq.; Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com. (1970) 11 Cal. App.3d 557, 570-573) the economic loss to the grantees of such lots is speculative at best and is clearly outweighed by the interests of the public.[18]

An obvious illustration of absolute title is a parcel that no longer has Bay frontage. Such property is valueless in its present state for trust uses. Defendants urge us, however, to include reclaimed but unimproved land with Bay

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17. Defendants' pleadings alleged that plaintiffs acquired no title whatever by the board deeds and that Berkeley owns the tidelands conveyed by those deeds in fee. Acceptance of this claim would return us to the law as it existed prior to *California Fish*. Before that case was decided, grants of tidelands conveyed in violation of the trust were held to be either void or voidable. (Kimball v. Macpherson (1873) 46 Cal. 103, 107; Taylor v. Underhill (1870) 40 Cal. 471, 473.) These determinations were modified in *California Fish*, which held that lands conveyed in violation of the trust were subject thereto. The suggestion of defendants that no title passed by the board deeds is unnecessarily draconian in its effect. As we point out above, there are means to achieve a substantial part of the objectives of the public trust by means which do not eliminate all the property rights of landowners whose predecessors in interest acquired title under the 1870 act.

18. Appleby v. City of New York (1926) 271 U.S. 364, relied upon by defendants, is distinguishable. There, the city had conveyed lots below tidewater to the plaintiffs for the specific purpose of developing a harbor. Later, the city built piers adjacent to the lots, and its tenants used the lots for mooring. It was held that under the laws of New York, the plaintiffs had received fee title to the lots, and they were thus entitled to an injunction to prevent the city from using the property for mooring. Since the grants made to plaintiffs in the present case were not to promote navigation, their titles, unlike that of the plaintiffs in *Appleby*, are subject to the public trust.

frontage in the areas subject to the trust on the ground that such property may still be useful for the exercise of the public trust. To the contrary, we believe that in balancing the interests at stake, the public right in such parcels may be adequately protected by our holding that only the tidal portions thereof are subject to the trust, coupled with the requirement of section 66602 of the Government Code that maximum feasible public access, consistent with a proposed project, must be provided to the shoreline of the Bay.[19]

We are not unaware that the implementation of our holding in the manner set forth above makes assumptions which are not valid in every case. Thus, for example, some reclaimed land might be eminently useful for trust purposes, and numerous persons who reclaimed or improved tidelands purchased under the 1870 act may not in fact have relied on either *Knudson* or *Alameda Conservation*. Indeed, many parcels affected by our decision may have been improved before *Knudson* was decided in 1915. Nevertheless, our broad assumptions are justified by the need to avoid the enormous burden of individual adjudications of such questions and to preclude clouding the titles of landowners around the Bay who own filled or improved properties conveyed under the 1870 act.

We appreciate also that there may be some improvements upon tideland areas, such as docks, in which a landowner's reliance interest should be recognized to some degree. It is impossible to anticipate in this opinion every conceivable nuance in the application of the basic principle set forth

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19. A number of cases hold or state that the reclamation of tidelands subject to the public trust does not, without more, terminate the trust. (E.g., Marks v. Whitney, supra, 6 Cal.3d 251, 261; Atwood v. Hammond (1935) 4 Cal.2d 31, 40.) But these cases did not involve the interests of landowners who had reclaimed tidelands in reliance upon decisions that were subsequently overruled.

above. Individual variations may be revealed subsequently, requiring further explication of the principles declared herein through future adjudication.

Let a peremptory writ of mandate issue, directing the trial court to set aside its order granting plaintiffs' motion for partial summary judgment and to proceed in accordance with the views expressed herein.

MOSK, J.

WE CONCUR:

BIRD, C. J.
TOBRINER, J.
NEWMAN, J.

COPY

CITY OF BERKELEY v. SUPERIOR COURT
S.F. 23686

DISSENTING OPINION BY CLARK, J.

Thousands of pleasure boats, freighters, docks, and harbor areas frame San Francisco Bay as testimonials to the wisdom of the Legislature in creating, and this court in upholding, a "public trust for commerce, navigation, fishing and related uses." (*Ante,* p. .....*)

Principal trust purposes are promotion of commerce, navigation and fishing, and not maintenance and protection of tidelands as some would have us believe.

For over 100 years California citizens have progressively improved the bay edges, demonstrating their reliance on the legislative acts before us today as having conveyed trust-free title. Likewise, state and local governments and

*Majority opinion, page 2.

the public at large have acquiesced in and endorsed those activities, revealing they too recognize the law as authorizing trust-free conveyances. Given the contemporaneous and longstanding construction of the law by public authority, private individuals and our courts, it is presumptuous for the majority of this court to now tell us the Legislature never intended to permit such progress.

Persons lacking vision and understanding 130 years ago might have argued that trust purposes could not be furthered in the Bay Area by terminating the trust as to a substantial portion of the tidelands.

However, room for argument no longer exists. History has taught its lesson, and there is overwhelming proof that terminating the trust as to part of the tidelands and submerged lands further trust purposes by permitting public utilization of the bay. As early as 1854, this court upheld termination of the tideland trust to further trust purposes stating it was "so self-evident that it needs no argument to prove" that in the bay, some land had to be filled in order to build a port of sufficient depth for ships. (Eldridge v. Howell (1854) 4 Cal. 80, 84.)

It is conceivable that even if the trust were not terminated, similar widespread utilization of the bay for trust purposes might have been achieved by private or government facilities. But such speculation is unnecessary. Termination of the trust as to large portions of tideland—affirmed by the court in Knudson v. Kearney (1915) 171 Cal. 250—has resulted in numerous facilities permitting widespread public use of the bay's resources.

Because the trust purposes have been fulfilled by termination of the trust—particularly through the Legislature's policy encouraging dredging and filling tidelands for public and private harbors—it is unnecessary to guess whether

those purposes would have been fulfilled had the trust not been terminated.

Recognizing the Legislature's success in promoting trust purposes—a matter as obvious in 1915 to the justices who unanimously decided *Knudson* as it is today—I am satisfied that, as demonstrated below, proper application of trust principles requires reaffirmance of that decision.

It is well established that tidelands and submerged lands owned by the state are held in trust for the public purposes of navigation, commerce and fisheries. (City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 482; People v. California Fish Co. (1913) 166 Cal. 576, 584.) Tidelands subject to the trust may not be alienated into absolute private ownership; an attempted conveyance of such land transfers "only bare legal title," and the property remains subject to the public trust easement. (*Id.*) Cases have established that the trust is a limitation on governmental as well as private reclamation activities. (City of Long Beach v. Mansell, *supra,* 3 Cal.3d 462, 482-486; Atwood v. Hammond (1935) 4 Cal. 2d 31, 38; City of Oakland v. Williams (1929) 206 Cal. 315, 327-328, 330-331.) Additionally, oil and gas leases to tidelands and submerged lands have been approved on grounds there would be no serious impairment of trust purposes and that public policy warranted development of mineral resources lying beneath submerged lands. (Boone v. Kingsbury (1918) 206 Cal. 148, 192-194.)

Conversely, cases have indicated that reclamation for general purpose county and municipal buildings and governmental housing projects does not further trust purposes. (City of Long Beach v. Mansell, *supra,* 3 Cal. 3d 462, 482; Atwood v. Hammond, *supra,* 4 Cal.2d 31, 37 et seq.; Alameda Conservation Assn. v. City of Alameda, *supra,* 264 Cal.App.2d 284, 286.) The main effect of the rulings is that

under the trust tidelands may be filled and used for commercial and recreational purposes but not residential purposes.

Apart from advancing trust purposes through reclamation, the " 'state in its proper administration of the trust may find it *necessary* or *advisable* to cut off certain tidelands from water access and render them useless for trust purposes. In such a case the state through the Legislature may find and determine that such lands are no longer useful for trust purposes and free them from the trust. When tidelands have been so freed from the trust—and if they are not subject to the constitutional prohibition forbidding alienation—they may be irrevocably conveyed into absolute private ownership.' (*City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, 482.)" (Italics added.) (Marks v. Whitney (1971) 6 Cal.3d 251, 260; see Mallon v. City of Long Beach (1955) 44 Cal.2d 199, 206.)

In the leading case of *People v. California Fish Co., supra,* 166 Cal. 576, the court recognized: "It is also settled that in the administration of this trust when the plan or system of improvement or development adopted by the state for the promotion of navigation and commerce cuts off a part of these tide lands or submerged lands from the public channels, so that they are no longer useful for navigation, the state may thereupon sell and dispose of such excluded lands into private ownership or private uses, thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use. On this subject in *Illinois C. Ry. Co. v. Illinois,* 146 U.S. 452 [36 L.Ed. 1018, 13 Sup.Ct.Rep. 118, the court said: 'It is grants of parcels of lands under navigable waters, that may afford the foundation for wharves, piers, docks and other structures in aid of commerce, and grants

of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.' (*Ward v. Mulford,* 32 Cal. 372; *Taylor v. Underhill,* 40 Cal. 473; *Kimball v. Macpherson,* 46 Cal. 107, 108; *Oakland v. Oakland W. F. Co.,* 118 Cal. 184 [50 Pac. 277]; *People v. Kerber,* 152 Cal. 733 [125 Am.St.Rep. 93, 93 Pac. 878]; *Messenger v. Kingsbury,* 158 Cal. 613 [112 Pac. 65].) The most striking instance of the exercise of this power of absolute disposition of such tide or submerged lands by the State of California is found in the laws providing for the improvement of the waterfront of San Francisco. By these laws the water-front line was fixed, cutting off from navigation a large area of land which was subject to the daily flux and reflux of the tides and part of the lands always under water, upon which line a sea-wall was constructed, and the area landward of this wall was subsequently surveyed into lots and streets, sold into private ownership and filled in for private use. This area now constitutes a large portion of the business section of San Francisco. The following cases recognize the authority of the state to make such absolute disposition of these particular lands: *Eldridge v. Cowell,* 4 Cal. 87; *Guy v. Hermance,* 5 Cal. 74 [63 Am.Dec. 85]; *Hyman v. Read,* 13 Cal. 444; *Holladay v. Frisbie,* 15 Cal. 634; *Wheeler v. Miller,* 16 Cal. 125; *Seabury v. Arthur,* 28 Cal. 142; *People v. Klumpke,* 41 Cal. 277; *Knight v. Haight,* 51 Cal. 171; *Friedman v. Nelson,* 53 Cal. 589; *Le Roy v. Dunkerly,* 54 Cal. 459; *Knight v. Roche,* 56 Cal. 21; *People v. Williams,* 64 Cal. 498; *San Francisco v. Straut,* 84 Cal. 124 [24 Pac. 814]." (166 Cal. at pp. 585-586.)

The instant program was one of three instituted by the

Legislature to convey tidelands and submerged lands. The first terminated the trust to establish part of the San Francisco, Oakland and other city waterfronts on San Francisco Bay. (*Eldridge v. Cowell, supra,* 4 Cal. 80; *Guy v. Hermance* (1855) 5 Cal. 73; *Oakland v. Oakland Water-Front Co.* (1897) 118 Cal. 160, 185, 201; see *Shirley v. City of Benicia* (1897) 118 Cal. 344, 346.) Under this program, the Legislature adopted a series of so-called "special acts" delineating a permanent waterfront line, approving maps setting forth streets and blocks for tidelands and submerged lands located inshore of the line, authorizing sales of the lands, and confirming private titles held in the lands. (E.g., Stats. 1851, ch. 4, p. 307; Stats. 1853, ch. 160, p. 219; Stats. 1855, ch. 181, p. 226.) Purchasers filled the property conveyed and deepwater ports were ultimately established.

In the first of the cases holding that conveyances pursuant to the special acts were free of the tidelands trust, this court in 1854 recognized: "In the plan of the City of San Francisco, the survey into blocks, lots and streets, extended into the tide waters in front of the City, the object of which was to reach a sufficient depth of water, on the land line, for the convenience of shipping. It was necessarily anticipated that the water lots would be filled up to a level suitable for building or land carriage. That this was perfectly legitimate, in the establishment of a seaport town, is so self-evident that it needs no argument to prove it." (*Eldridge v. Cowell, supra,* 4 Cal. 80, 87.) Our court held that because the state had statutorily "recognized" the city plan, the defendant who had purchased and filled his lot was free of the trust. (*Id.*)

The second program was one of general disposition, statewide in scope from the Oregon line to Mexico, excepting

San Francisco Bay. The statutes did not establish waterfront lines or otherwise attempt to determine tideland or harbor development. Almost all of the tidelands encompassed were unsuitable for harbor development. In *People v. California Fish Co., supra,* 166 Cal. 576, we held that all tidelands and submerged lands conveyed pursuant to that program were subject to the trust because no enabling statute indicated a legislative intent to promote or regulate navigation, commerce, and fishing.

The third program involving the lands in the instant case was established by the acts of 30 March 1868 (Stats. 1867-1868, ch. 543, p. 716) and 1 April 1870 (Stats. 1869-1870, ch. 388, p. 541). By then the Legislature was obviously aware of (1) this court's decisions holding the special acts terminated the trust and (2) the success of the special acts in furthering trust purposes. The 1868 and 1870 acts were intended to give the remainder of San Francisco and nearby communities the same opportunities to develop harbors, commerce, and fishing facilities as had been given to portions of San Francisco and Oakland by the special acts.

The 1868 act created the Board of Tideland Commissioners (BTLC), and empowered it to survey and sell at public auction certain salt marsh, tide and submerged lands within San Francisco. The act directed the BTLC to establish a waterfront line and to reserve lands for "streets, docks, piers, slips, canals, drains or other use necessary for the public convenience in the purposes of commerce."

The 1870 act "supplementary to and amendatory of" the 1868 act extended the BTLC's jurisdiction to lands within five miles of San Francisco which were covered by less than nine feet of water at low tide. BTLC was directed

to survey the land, sell lots, establish two 600-foot wide canals, and reserve canals and basins wherever they deemed necessary "for the purpose of drainage, navigation and the wants of commerce." All lot subdivisions required approval by a state board composed of the Governor, the Surveyor-General, and the Controller. With respect to lands adjacent to the Berkeley area, BTLC divided about one-third into lots and reserved the remaining two-thirds to "navigation and the wants of commerce."

It is estimated that while 88 square miles of the bay were under its jurisdiction, BTLC subdivided for sale approximately 36 square miles. It is also estimated that only 12 square miles have been filled and that about 6 square miles have been improved by homes, businesses and industries valued at over $2.5 billion. Included are substantial portions of San Francisco, Corte Madera, Richmond and other communities.[3]

Knudson held BTLC conveyances pursuant to the 1868 and 1870 acts, like conveyances pursuant to the "special acts," are trust-free conveyances. Relying upon *Knudson,* several subsequent cases have reaffirmed that conveyances pursuant to the 1868 and 1870 acts are free of the trust. (Marks v. Whitney, supra, 6 Cal.3d 251, 258, fn. 6; City of Long Beach v. Mansell, *supra,* 3 Cal.3d 462, 485, fn. 20; Alameda Conservation Assn. v. City of Alameda, *supra,* 264 Cal.App.2d 284, 287.)

Claiming *Knudson* is contrary to *California Fish,* and is based on a mischaracterization of the 1868 and 1870 acts,

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3. Lands sold by the BTLC appear to include: Parts of the Marina District in San Francisco; lands extending south from Second Street in San Francisco to San Francisco Airport; Marin County from Sausalito north to Hamilton Air Force Base, including parts of downtown Corte Madera and San Rafael; the East Bay from Oakland north to San Pablo and from Oakland south to San Leandro, including portions of Richmond and Emeryville, among other cities.

petitioners urge us to repudiate *Knudson*. We should reject the invitation.

In *Knudson,* plaintiff sued to quiet title to a two-acre parcel of tideland, arguing his occupancy conferred a title superior to that of defendant, who held title under the 1868 and 1870 acts. Plaintiff argued under *California Fish* that defendant's title was subject to the public trust and title by possession prevailed over such a limited private title. The holding in *California Fish* was distinguished because it involved grants made under the general disposition program, which was not enacted in furtherance of trust purposes. In contrast, the court asserted it was "obvious" the 1868 and 1870 acts were enacted in aid of navigation. In support of this position, the court pointed out the acts provided for improving San Francisco Bay "so as to make it more suitable for navigation" by delineating the boundaries of navigable waters and fixing the waterfront line with the BTLC empowered to determine what land was required for "streets, docks, piers, slips, canals, drains or other uses necessary for public convenience," the surplus to be sold to the public in absolute fee. (171 Cal. at p. 251.)

The *Knudson* court correctly construed the 1868 and 1870 acts as providing for conveyances free of the trust. As a general rule, the legislative determination that land shall be severed from the public trust "is conclusive upon this court in the absence of evidence indicating that the abandonment of the public trust will impair the power of succeeding legislatures to protect, improve, and develop the public interest in commerce, navigation, and fisheries." (Mallon v. City of Long Beach (1955) 44 Cal.2d 199, 207; County of Orange v. Hiem (1973) 30 Cal.App.3d 694, 717.)

The *Knudson* court reasonably interpreted the 1868 act as demonstrating a legislative intent to further the public interest in commerce, navigation and fishing. It is evident

the Legislative exhibited concern for the public trust when it adopted that plan to fix the boundaries of navigable waters, delineate the waterfront line and sell for private use land that BTLC determined was not required for docks, piers, slips or other purposes of navigation. Given the detail of the 1868 act with respect to the BTLC's duties in planning the harbor area, it follows, as the *Knudson* court concluded, the acts "were enacted in aid of navigation and for the purpose of providing improvement of San Francisco Bay, so as to make it more suitable for navigation." (171 Cal. at p. 253.)

The 1870 act was expressly enacted "supplementary to and amendatory of" the 1868 act and, as such, was promulgated with the same concern toward trust purposes reflected in the earlier act. For this reason, I must reject the majority's reliance on some minor differences between the acts as a basis for distinguishing them.[4]

Three additional factors fortify the conclusion that conveyances by the BTLC pursuant to the 1868 and 1870 acts were free of the trust. The historical context demonstrates the success of the "special acts" in establishing harbor facilities through the combined use of public and private capital. The 1868 and 1870 acts were obviously patterned after the earlier "special acts." The difference is that in the earlier "special acts" the Legislature itself fixed the waterfront lines and provided for retention of property for navigation, commercial, and fishing purposes. Under the 1868 and 1870 acts, the Legislature delegated to the BTLC the duty to fix the waterfront line and to determine which properties were useful and to be retained for trust purposes. (As to the 79 acres involved in the present case,

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4. Although the majority purport in places to separate the 1868 and 1870 acts, in other places they are grouped. For example, the Attorney General's opinion relied upon related to the 1868 act but is used to construe the 1870 act.

the parallel to the San Francisco waterfront is complete. Like the San Francisco piers, the Berkeley marina is on the bayward side of the conveyed and filled property.)

Secondly, the claim of conflict between *California Fish,* the main case relied upon by petitioners, and *Knudson* must be considered in light of the fact that both opinions were authored by Justice Shaw, that *Knudson* was decided 21 months after *California Fish,* and that six of the seven justices participating in *California Fish* participated in the unanimous determination in *Knudson.* The 66 pages of majority, concurring, and dissenting opinions in *California Fish* and companion cases by three justices demonstrate their scholarly knowledge of the trust doctrine, and I must reject the claim that our court in *Knudson* was not fully aware of the doctrine. Far from indicating a lack of understanding of the issue, the brevity of the *Knudson* opinion indicates that the able justices believed determination of the issue simple and clear.

Thirdly, the *Knudson* court was certainly aware that in the 45 years between adoption of the legislation and its decision, thousands of private parties were openly and notoriously dredging, filling, improving, and using tidelands indicating their understanding the legislation permitted these activities. The legislative, executive, and local governments, by acquiescing and encouraging these activities, reflected the same construction of the legislation. Today's remarkable rejection of such contemporaneous and long-standing construction presents ominous possibilities for future use of this rule of construction. (Cf. In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 349, fn. 4; Rivera v. City of Fresno (1971) 6 Cal.3d 132, 140; Coca Cola Co. v. State Bd. of Equalization (1945) 25 Cal.2d 918, 921-923; Whitcomb Hotel, Inc. v. California Employment Comm. (1944) 24 Cal.2d 753, 756-758; Worth-

ington v. Unemployment Insurance Appeals Bd. (1976) 64 Cal.App.3d 384, 389.)

The majority assert that the acts impair the power of succeeding legislatures to protect, improve, and develop the public interest in commerce, navigation, and fisheries. There is, however, no showing to this effect. The numerous public-private developments throughout the bay tell us the contrary—emphasizing the wisdom of the legislative plan to permit private and public bay development. Specifically, the 1868 and 1870 acts did not prevent the City of Berkeley from developing its marina on the bayward side of property conveyed by the Tideland Commissioners to defendants' predecessors.

Arguing that the Legislature never intended to terminate the trust by the 1868 and 1870 acts, the majority rely primarily on a report of the Attorney General. (Append. to Senate and Assembly Journals, vol. 2, 17th sess. 1868.) That report briefly discussed how the state's title in the tidelands at issue would "vest . . . in others through the action of the [Board of Tideland] Commissioners." (*Id.*, at p. 6.) Reliance is placed on the following language: "The State, in making this disposition of those lands, passes the title with the same disability which obtains with the State. Her purchaser can acquire from the State no such title as will enable the owner or holder of them to use them to the detriment, destruction or prejudice of commerce or navigation. For such uses the public have an easement, and the *Government* retains and has the authority to enforce the right." (*Id.;* italics added.)

The Attorney General's statement fails to establish legislative intent to continue the tideland trust as to lands conveyed pursuant to the acts. By noting the "Government" retains the right to enforce an easement, the Attorney General was referring to the United States Government, not the state government. Earlier in the Attorney General's

report, and in several places in a second opinion submitted to the Assembly Committee, the United States Government is referred to as the "Federal Government" or the "General Government." Nowhere in either report is the State of California called the "Government"; rather, both the Attorney General and Senator Creed Haymond, author of the second report, consistently speak of California as "the State" or the "State of California."

Thus, it appears the Attorney General was reiterating the established rule of law that although the state has absolute power to convey land underlying navigable water, state transfer does not terminate the federal right to regulate obstruction to navigation. (Colberg Inc. v. State of California ex rel. Department of Public Works (1967) 67 Cal.2d 408, 416.) He was not advising the Legislature that the state was retaining an easement in the tidelands at issue. Senator Creed Haymond's report supports such interpretation of the legislative intent. He advised the Assembly Committee: "[I]t follows that the State of California is the owner of the shores and soils under the navigable waters within her limits; that she holds the same by virtue of her state sovereignty, with full power to alienate them, subject only to the right of conservation resting in the General Government." (Report to the Special Committee of the Assembly in Relation to San Francisco Tide Lands, p. 8, Append. to Senate and Assembly Journals, vol. 2, 17th sess. 1868.)

It has been suggested both acts reveal little public purpose beyond raising revenue for the state and that the 1870 act disposed of public land preserving only minimal navigational access. (See Comment (1972) 60 Cal.L.Rev. 225, 251-252.) However, there is little support for such an interpretation. In the report discussed above, references to revenue from land sales were not made with respect to a

sole purpose of land disposition; rather, the report concluded the revenue was a collateral, albeit appreciated, benefit of the enactments.[5]

It is urged that even if conveyances pursuant to the 1868 and 1870 acts passed trust-free title, grantees and their successors were required to reclaim their land within a reasonable time or suffer reinstatement of the trust. Nothing in the deed or statute warrants implication of such a condition subsequent. Moreover, conditions subsequent are disfavored because they may result in forfeiture. (MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App.3d 693, 699.) The condition subsequent would cause manifest injustice to those who—relying on *Knudson*—filled land and built upon it, and those who paid real property taxes over the past 100 years.

The principle case relied on by the majority to establish the condition subsequent theory (People v. Williams (1884) 64 Cal. 698) holds merely that an offer to dedicate land for construction of specified improvements is not effective to create a public easement until the offer has been accepted and the improvements made. This and other cases cited by the majority furnish no basis for concluding all grants of tidelands are necessarily subject to conditions subsequent.

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5. After a lengthy discussion of the navigational purposes of the tideland trust, the state's power to terminate the trust, and the nature of a private owner's possession of such land after sale, Senator Haymond ended his report with a brief statement concerning revenue: "If rumor is to be credited, these lands have been a fruitful source of corruption and have been made the foundation of gigantic lobby schemes—the State has been despoiled of her interest in valuable portions of them, and the time has arrived that an end should be put to schemes that grow out of their retention by the State. Whilst the Legislature has the power to give them away lot by lot to private parties, it has not the moral right to so dispose of them. Our State is burdened with a debt of five millions of dollars and the people are weighed down by taxation. [¶] If these lands are sold under the provisions of the Farish bill, the State will receive into her Treasury more than a million of dollars." (Report, *supra,* at p. 10.)

CONCLUSION

We should reaffirm the holding that conveyances pursuant to the 1868 and 1870 acts passed title free from the trust. This does not suggest that owners of submerged lands may reclaim their property free from pertinent federal, state and local regulation. Tidelands—whether free or subject to the trust—remain subject to regulation as to *whether* they may be filled (Gov. Code, § 66600 et seq.; People ex rel. S.F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal.2d 533, 544; Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com. (1970) 11 Cal.App.3d 557, 570-573), and while the lands remain submerged or become flooded by navigable waters, they are subject to the public's right to fish and pass over them. (Bohn v. Albertson (1951) 107 Cal.App.2d 738, 748 et seq.)[6]

Rather than condemning the Legislature's fundamental policy encouraging private parties to dredge and fill tidelands to permit public and private harbor development, we should recognize the determination greatly furthered the purposes of the trust. The bay has been developed permitting widespread public access according to long settled rules. We should not now attempt to impeach those rules, the legislative determination establishing them, or this court's affirmance of them. We should embrace our heritage and be thankful for it.

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6. My conclusion that we should adhere to *Knudson* requires denial of mandate, and it is unnecessary to reach the alternate ground relied upon by the trial court in granting the motion for partial summary judgment. Although the parties had not raised the matter, the trial court concluded that the state was collaterally estopped to claim that conveyances pursuant to the 1868 and 1870 acts were not free of the trust. The court relied upon Alameda Conservation Assn. v. City of Alameda, *supra*, 264 Cal.App.2d 284, 287, where the state successfully took the position that *Knudson* should be followed and such conveyances were free of the trust.

Public policy as to development of San Francisco Bay may have changed as the majority suggest, but this furnishes no basis for impeaching the legislative determinations of 1868 and 1870 to terminate the trust as to portions of the tidelands and submerged lands in furtherance of trust purposes. The program has been too successful to be condemned by judicial fiat, and the need to promote commerce and harbor development is as great now as ever.

Moreover, it is for the Legislature and not this court to determine policy. The Legislature has made it clear that "private investment in shoreline development should be vigorously encouraged" in San Francisco Bay. (Gov. Code, § 66605.1.)[7]

Mandate should be denied.

CLARK, J.

WE CONCUR:

RICHARDSON, J.

MANUEL, J.

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7. Government Code section 66605.1 provides: "The Legislature finds that in order to make San Francisco Bay more accessible for the use and enjoyment of people, the bay shoreline should be improved, developed and preserved. The Legislature further recognizes that private investment in shoreline development should be vigorously encouraged and may be one of the principal means of achieving bay shoreline development, minimizing the resort to taxpayer funds; therefore, the Legislature declares that the commission should encourage both public and private development of the bay shoreline."

Section 66606 provides: "The Legislature hereby finds and declares that this title is not intended, and shall not be construed, as authorizing the commission to exercise its power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States."

APPENDIX "B-4"

Denial of Petition for Rehearing (California Court of Appeals— Filed July 28, 1979)

Court of Appeal of the State of California
In and for the

First Appellate District

DIVISION FOUR

CITY OF BERKELEY, ETC., et al., *Petitioners,* vs. SUPERIOR COURT, COUNTY OF ALAMEDA, *Respondent,* SANTA FE LAND IMPROVEMENT COMPANY, ETC., et al., *Real Parties in Interest.*	No. 42466 Superior Court No. 422942

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated JUL 28 1978

RATTIGAN, J. ACTING P.J.

APPENDIX "B-5"

Opinion and Order Issuing Peremptory Writ of Mandate (California Court of Appeals— June 30, 1978)

FILED
JUN 30 1978

In the Court of Appeal of the State of California
First Appellate District, Division Four

CITY OF BERKELEY, a political subdivision of the State of California, and the STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION, *Petitioners,* vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ALAMEDA, *Respondent,* SANTA FE LAND IMPROVEMENT COMPANY, a California corporation, and GEORGE W. MURPHY, *Real Parties in Interest.*	1 Civil 42466 (Sup. Ct. No. 422942)

This original proceeding in mandamus involves a conflict between public and private claims regarding the ownership of a tract of land located on the shoreline of San Francisco Bay. Petitioners, the City of Berkeley and the State of California, are the defendants in a consolidated action pending in respondent court.[1] Real parties in interest George W. Murphy and Santa Fe Land Improvement Company, a corporation, are the plaintiffs in the action. They moved for

1. We occasionally refer to petitioners as the "City" and the "State," respectively. The State has appeared, in respondent court and in this proceeding, through the State Lands Commission.

summary judgment upon certain issues tendered and joined in the pleadings. Respondent court granted their motion in an order which has, or portends, the effect of confirming absolute title to the tract in real parties. Petitioners seek a peremptory writ of mandate requiring the court to set the order aside. By reason of the course this proceeding has heretofore taken, the remedy lies.[2]

A preliminary recital of relevant geographical and historical factors is in order.[3] San Francisco Bay extends easterly, and for substantial distances north and south, from its entrance at the Golden Gate. The City, which was incorporated in 1878 (stats. 1877-78, ch. 565, p. 888), is in Alameda County and on the east side of the northern reach of the Bay. Its boundaries include about two miles of shoreline on the Bay, the familiar upland area of the City to the east, and a large submerged area of the Bay floor lying to the west. The tract in dispute is entirely within the City, at and immediately offshore from the shoreline.

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2. The petition for a writ of mandate was initially filed in the Supreme Court, which transferred it to this court. We denied it. The Supreme Court granted a petition for hearing, transferred the cause to itself, and retransferred it to this court with directions to issue an alternative writ of mandate. We complied. It has thus been determined that petitioners are without an adequate remedy in the ordinary course of law. (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 492; 5 Witkin, California Procedure (2d ed. 1971) Extraordinary Writs, § 94, pp. 3869-3870.)

3. This recital, and others which follow, involve a wide range of historical and geographical matters which are subject to judicial notice. Some of them were called to the attention of respondent court in the proceedings upon real parties' motion for summary judgment. Others have been cited in the present proceeding. We consequently resort to judicial notice on a broad scale throughout this opinion. (Evid. Code, §§ 451 [subd. (f)], 452 [subds. (g), (h)], 453, 459.) The parties have been placed on notice of our intention to do this.

Because the Bay is an estuary of the Pacific Ocean, its waters are tidal. The lands which now include the disputed tract were consequently tidelands in part, and partly submerged lands, in their natural condition.[4] They were in that condition when the State was admitted to the Union in 1850, and they were not then held in private ownership. The State accordingly assumed their "ownership" at that time as an incident of its sovereignty, and subsequently held them in trust for public purposes traditionally defined in terms of navigation, commerce and fishing. (*City of Long Beach v. Mansell, supra,* 3 Cal.3d 462 at p. 482.) The principal issue joined in the pleadings before us, and addressed by the order under review, is whether the tract in dispute is presently held subject to this so-called "tideland trust."

The pleadings emerged from a complicated procedural sequence which need not be recited. For purposes of this proceeding, they include separate amended complaints filed by the respective real parties and separate answers to each by the City and the State. Their length and detail preclude reproduction in full, but we describe them as pertinent.

The allegations of the amended complaints may be summarized as follows: Real parties, between them, own a described 79-acre tract of land located at the Berkeley shoreline. By laws enacted in 1868 and 1870, the Legislature "authorized" the State, through its Board of Tide Land Commissioners, to convey certain tidelands and submerged lands into private ownership "free of the trust for com-

4. "Tidelands," properly speaking, are those lands lying between the lines of mean high tide and mean low tide. "Submerged lands" are properly lands which lie seaward of mean low tide and are not uncovered in the ordinary tidal ebb. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 478, fn. 15.)

merce, navigation and fishing" described above.[5] The land which now comprises the 79-acre tract was conveyed to real parties' predecessors in interest, by the Board of Tide Land Commissioners, pursuant to both laws. Consequently, and by devolution, real parties now own the tract free of the trust. It has been filled since their predecessors in interest acquired it. The City and State claim an interest in it and dispute real parties' claims to it. On the strength of these allegations, real parties seek a decree quieting their title and declaratory relief to the same effect.

In their answers, the City and the State generally deny that real parties own the 79-acre tract as alleged in the amended complaint. The City alleges as an affirmative defense that the tract is "subject to the . . . state navigational servitudes and public trust." The State pleads a similar affirmative defense, but in more explicit terms and alternatively, alleging as follows: The City owns the tract in fee simple, but "subject to the public trust for purposes of commerce, navigation, fisheries, recreational and environmental uses," by reason of a statory grant made to it by the Legislature in 1913 and amended in subsequent statutes.[6] In the alternative, the tract is "burdened with a pub-

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5. Real parties expressly cited the 1868 and 1870 laws in their amended complaints. The first is cited as the "act of March 30, 1868," and is entitled "An act to survey and dispose of certain salt marsh and tide lands belonging to the State of California." (Stats. 1867-68, ch. 543, p. 716.) The second, cited as the "act of April 1, 1870," is entitled "An act supplementary to and amendatory of" the first one. (Stats. 1869-70, ch. 388, p. 541.) We refer to them on occasion as the "1868 act" and the "1870 act," respectively.

6. In the first of these enactments, all of which the State expressly cited, it had "granted to the City of Berkeley, a municipal corporation of the State of California, . . . all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all the salt marsh, tide and submerged lands, whether filled or unfilled, within the present

lic-trust easement for the benefit of the People of the State" and for the same purposes, "which easement is administered by the City" pursuant to the 1913 grant as amended.

Real parties' motion was for "partial summary judgment" to the effects (1) that the 79-acre tract had been conveyed by the State, "free of the public trust for commerce, navigation and fishing," pursuant to the 1868 and 1870 acts (see fn. 5, *ante*) and (2) that the City had "received no title to or public trust interest in" the tract by virtue of the 1913 grant as amended. (See fn. 6.)

In support of the motion, real parties produced and authenticated a series of deeds by which the Board of Tide Land Commissioners had conveyed to their predecessors in interest, pursuant to the 1868 and 1870 acts, "all the right title and interest of the State of California in and to" an array of lots described by reference to a recorded map. The deeds had been executed in various years between 1872 and 1875, inclusive. It was also established by declaration that the lots described in them included the disputed 79-acre tract.

The State filed an opposing declaration, and documentation, which showed that part of the full 79-acre tract had been reclaimed and filled since the execution and delivery of the 1872-1875 conveyances. These documents also summarized the activities of the Board of Tide Land Commissioners, pursuant to the 1868 and 1870 acts, as they had affected the tidelands and submerged lands which now comprise the tract, other such lands in the immediate

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boundaries of said city, and situated below the line of mean high tide . . . , to be forever held by said city . . . in trust" for specified purposes and upon explicit conditions. (Stats. 1913, ch. 347, § 1, p. 705 et seq.) The later enactments cited made various changes in the purposes and conditions of the 1913 grant, but not in the language just quoted. (Stats. 1915, ch. 534, p. 901; stats. 1917, ch. 596, p. 915; stats. 1919, ch. 517, p. 1089; stats. 1961, ch. 2180, p. 4516; stats. 1963, First Ex. Sess. 1962, ch. 55, p. 343.)

vicinity, and still others located elsewhere in the Bay.

The order granting real parties' motion was embodied in a memorandum decision filed by respondent court. The court reviewed the matters shown on the motion, and stated the principal ground for granting it, in this language:

"Plaintiffs move for partial summary judgment on the ground that they own free and clear of the public trust for commerce, navigation and fisheries 79 acres of former [*sic*] tide and submerged lands conveyed to their predecessors in interest pursuant to the act of March 30, 1868, . . . and the supplementary act of April 1, 1870 . . . . The tract in question . . . [is] . . . in the City of Berkeley, and all but a fraction of an acre of it has been filled. Approximately one-third of the tract lies between the 1870 lines of mean high tide and mean low tide and the remainder as of that time was submerged land. . . . For the reasons hereinafter stated partial summary judgment is granted on the ground that the State's right, title and interest, including any public trust for commerce, navigation and fisheries, was sold pursuant to the above statutes.

"Case authority in California squarely holds that conveyances pursuant to the 1868 and 1870 legislative acts of tide and submerged lands in the San Francisco Bay area terminated the public trust for commerce, navigation and fisheries, to which such lands had previously been subject, with the consequences that private grantees received unencumbered fee title thereto as of the date the conveyances were made. (*Knudson v. Kearney* (1915) 171 Cal. 250, *Alameda Conservation Assn. v. City of Alameda* (1968) 264 Cal.App.2d 284.) The 79 acres here in question were conveyed . . . to plaintiffs' predecessors pursuant to the 1868 and 1870 Acts so that the above cases are binding on this court under the principle of stare decisis. . . . [T]he

1913 grant by the State to the City of Berkeley of tide and submerged lands within its boundaries [does not] provide assistance to the defendants because the State could convey no better title to the City than it had itself and, [it] having previously divested itself of any interest in the subject property, it follows that nothing passed to the City of Berkeley in 1913."

As an additional ground for granting the motion, the court invoked the doctrine of collateral estoppel: "[I]n the *Alameda Conservation Association* case the State itself as a party successfully resisted a suit to enjoin the dredging and filling of a multi-acre tract of submerged land adjacent to the City of Alameda conveyed by the State in 1873 pursuant to the same statutory authorization as the tract here on the ground that the conveyance terminated the public trust. The State, therefore, is collaterally estopped to assert that the land here, in all respects analogous to that in Alameda, is subject to the public trust. . . ."

THE DETERMINATION THAT THE 1872-1875 DEEDS PASSED TITLES FREE OF THE TIDELAND TRUST

As respondent court's memorandum decision makes clear, this determination was based exclusively upon the two decisions which the court cited as "binding" interpretations of the 1868 and 1870 acts. (*Knudson v. Kearney, supra,* 176 Cal. 250; *Alameda Conservation Assn. v. City of Alameda, supra,* 264 Cal.App.2d 284.) Between them, *Knudson* controls because the later decision follows it on the subject of land titles conveyed by the State pursuant to the two acts. (*Alameda Conservation Assn. v. City of Alameda, supra,* at p. 287.) The acts enabled one of three distinct statutory programs in which the State disposed of tidelands and submerged lands during the early years of its existence. *Knudson* was decided when the programs finally converged in

the Supreme Court. The question whether it is "binding" here may accordingly be approached through the programs' history which preceded it. We describe the programs in the sequence in which they developed.

The Special-Act Program Affecting The Northern San Francisco Waterfront

The first disposition program was set in motion by a series of statutes enacted by the Legislature during the first decade of statehood. They were so-called "special acts" because they expressly pertained to the State's disposition of tidelands and submerged lands in San Francisco only. Among them, they delineated a mapped line "within the City of San Francisco," along and offshore from its natural shoreline on San Francisco Bay and generally north of Second Street; established a "permanent water front of said city" on the line; granted or authorized the sale of the State's interest in tidelands and submerged lands located inshore of the line; and confirmed private titles held in the lands under pre-statehood grants or in consequence of the special acts themselves. (Stats. 1851, ch. 41, p. 307; stats. 1853, ch. 160, p. 219; stats. 1855, ch. 181, p. 226; stats. 1858, ch. 66, p. 52.)[7] None of these acts referred to the tideland trust doctrine, but its rudiments were expressed in some early decisions upholding the termination of the trust as to the affected lands in San Francisco. (E.g., *Eldridge v. Cowell* (1854) 4 Cal. 80, 88; *Guy v. Hermance* (1855) 5 Cal. 73, 75.) In varying contexts and language, these and other

7. A few contemporaneous special acts made similar but less explicit grants to other named coastal cities. (See, e.g., stats. 1851, ch. 37, p. 305 [Martinez]; stats. 1851, ch. 83, p. 348 [Benicia]; stats. 1852, ch. 107, p. 180 [Oakland]; stats. 1857, ch. 82, p. 76 [Eureka].) Some of these enactments have been sporadically cited in this proceeding, but they are not otherwise involved.

decisions established that private titles to the lands were held free of the trust. All of the decisions reaching this result, and the circumstances underlying it, were later reviewed in *People v. California Fish Co.* (1913) 106 Cal. 576, 585-586. We refer to the circumstances when we reach that decision.

The General Disposition Program

This program was adopted and developed in a distinct series of early enactments authorizing the sale of State-owned lands. They have been termed "general disposition statutes" because they were statewide in scope and were not addressed to any particular localities except for some they excluded. (See Comment, *The Tideland Trust: Economic Currents In A Traditional Legal Doctrine* (1974) 21 UCLA L.Rev. 822, 837-839; San Francisco Bay Plan Supplement (1969) p. 428.)[8]

The first three general disposition statutes directed the sale of "swamp and overflowed lands" throughout the State except in or near San Francisco and at certain other designated points. (Stats. 1855, ch. 151, §§ 1 [p. 189], 11 [pp. 190-191]; stats. 1858, ch. 235, §§ 1 [p. 198], 13 [p. 201]; stats. 1859, ch. 314, p. 340.) These statutes reached lands granted to the State by the United States, but not tidelands or submerged lands it had acquired by reason of its sovereignty. (*People v. Morrill* (1864) 26 Cal. 336, 353-358; Taylor, *Patented Tidelands: A Naked Fee?* (1972) 47 State Bar J. 420, 484, fn. 3.) An 1861 statute brought State-owned

8. The "Supplement" cited here is part of a report made to the Governor and the Legislature by the San Francisco Bay Conservation and Development Commission pursuant to 1965 legislation which established the Commission for the purpose of regulating use and development of the Bay. (Stats. 1965, ch. 1162, § 1, pp. 2940-2941, 2946.) We hereinafter cite the Supplement as "BCDC Supp."

"tide lands" within the general disposition program, but it reiterated the earlier exception by excluding any lands "located within five miles of San Francisco" and in other areas of San Francisco Bay, (Stats. 1861, ch. 356, § 1, p. 363.)

The general disposition program remained in effect pursuant to the 1861 enactment and successor statutes which continued the San Francisco exception. (Stats. 1863, ch. 397, §§ 1 [p. 591], 30 [p. 601]; stats. 1867-68, ch. 415 [p. 507], §§ 28 [p. 514], 70 [p. 528]; stats. 1871-72, ch. 425, §§ 1, 3 [pp. 622-623].) The entire program was incorporated into the Political Code when it was enacted in 1872. (Pol. Code (1872) §§ 3440-3493½ inclusive.) The exception of tidelands in or near San Francisco was retained in the codification. (*Id.*, § 3488.)

Among the several general disposition statutes in this sequence, those which authorized the sale of tidelands did not mention *submerged* lands. (BCDC Supp., pp. 428, 434.) None of them enabled the sale of State-owned tidelands, in or close to San Francisco, because of the persistent exclusion of these lands from the program as described above. By the mid-1860's, no substantial area of tidelands or submerged lands was available for sale in San Francisco, under the earlier special acts, because of those acts' limited geographic reach. These factors apparently brought about the disposition program next described.

The Second Special-Act Program

This program was conducted pursuant to the 1868 and 1870 acts under which real parties in interest claim title to the 79-acre tract in Berkeley. They were also "special acts" because they again pertained to San Francisco in the first instance and to its close vicinity in the second. They may be summarized at this point as follows:

The 1868 act created the Board of Tide Land Commissioners and invested it with the "charge and disposition of all the salt marsh and tide lands belonging to the State of California, situated in the City and County of San Francisco." (Stats. 1867-68, ch. 543, p. 716.) It directed the Board to survey and map the tidelands along the Bay shoreline, and the adjacent submerged land out to 24 feet of water at lowest tide, within the city and county; to establish the "water line front [*sic*] of San Francisco" on the map;[9] to resurvey, and to remap into lots, the tidelands and submerged lands inshore of the "water line front"; and to sell off, at public auction and upon prescribed terms and conditions, the State's interest in the remapped lots. (*Id.*, §§ 4-8, pp. 717-721.)

The 1870 act amended and supplemented the 1868 act (see fn. 5, *ante*) by investing the Board of Tide Land Commissioners with the further "charge and disposition" of the State's tidelands, and of its adjacent submerged lands "to nine feet of water at extreme low tide, within five statute miles of the exterior boundaries" of the City and County except for lands theretofore granted to the City of Oakland. (Stats. 1869-70, ch. 388, § 1, p. 541.) It further directed the Commissioners to have the affected lands surveyed and subdivided into small lots, reserving certain "canals" and related facilities; to map the results; and to sell the State's interest in the mapped lots, again at public

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9. The location of the new waterfront line at 24 feet of water represented engineers' judgment of the maximum depth to which the lands within should be filled or at which piers should be built to provide access for deep-water ships. (BCDC Supp., p. 430.) The language of the 1868 act itself shows that the new line was to be an extension, south from Second Street, of the "permanent water front" line established in the first of the special San Francisco waterfront acts. (See stats. 1867-68, ch. 543, § 4, p. 718, citing the "Act" of March 26, 1851.)

auction and upon terms and conditions similar to those prescribed in the 1868 act. (*Id.*, §§ 2-3, pp. 541-543.)

The Board's compliance with the 1870 act produced a series of recorded maps showing subdivisions of small lots, extending seaward from the 1870 line of mean high tide, in northern Alameda County and throughout the middle reaches of San Francisco Bay. [10] Some of these subdivided lots were described in the 1872-75 deeds under which real parties in interest claim title to the 79-acre tract in dispute.

The General Disposition Program In The Courts

We have seen that private titles to lands acquired in the early San Francisco waterfront program were soon held to be free of the tideland trust. (E.g., *Eldridge v. Cowell, supra,* 4 Cal. 80 at p. 88; *Guy v. Hermance, supra,* 5 Cal. 73 at p. 75.) This result was not reached in contemporaneous decisions involving tidelands acquired under the general

10. In the 1870's, the "exterior boundaries" of the City and County of San Francisco were on the floor of the Bay and well offshore from the San Francisco upland. Their configuration extended the 5-mile reach of the act for substantially greater distances away from the upland. Its water-depth specification ("nine feet . . . at extreme low tide") limited its reach to the shallower waters on the periphery of the Bay. In consequence of these factors, the subdivisions mapped by the Board, and still of record, are located along the shoreline of San Mateo County as far south as the present location of San Francisco International Airport; along the Marin County shoreline between Sausalito and the present site of Hamilton Air Force Base; and along the East Bay shoreline from Oakland to San Leandro on the south and from Oakland to San Pablo on the north. (See BCDC Supp., p. 432.) The subdivided lots run in rows which are uninterrupted except for "canals" mapped by the Board at various points. It was shown on real parties' motion that the subdivisions now include approximately 36 square miles of the Bay floor below the 1870 line of mean high tide, and that two-thirds of this area (approximately 24 square miles) is covered by the waters of the Bay.

disposition program. The variations among them need not be summarized here, but they raised a continuing question whether the State could pass title to these tidelands free of the trust or at all. (See Comment, *supra,* 21 UCLA L.Rev. 826 at pp. 832-842; Comment, *Private Fills In Navigable Waters: A Common Law Approach* (1974) 60 Cal.L.Rev. 225, 244-248.) The question was not resolved until 1913, when the Supreme Court decided *People v. California Fish Co., supra,* 166 Cal. 576.

This decision is still definitive on the entire subject of the tideland trust. (See *City of Long Beach v. Mansell, supra,* 3 Cal.3d 462 at p. 482, fn. 16; Note, *California's Tideland Trust: Shoring It Up* (1971) 22 Hastings L.J. 759, 765-766.) It involved private titles to southern California tidelands acquired under the general disposition program as codified in the 1872 Political Code, and to the adjacent submerged lands. (166 Cal. at pp. 582-583.) The question was whether the lands were held subject to the trust. (P. 583.) After confirming the origins and reach of the trust in terms of navigation, commerce and fishing (p. 584), the court stated:

"It is also settled that in the administration of this trust when the plan or system of improvement or development adopted by the state for the promotion of navigation and commerce cuts off a part of these tide lands or submerged lands from the public channels, so that they are no longer useful for navigation, the state may thereupon sell and dispose of such excluded lands into private ownership or private use, thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use. . . ." (166 Cal. at p. 585.)

The court next referred to the early San Francisco waterfront acts (cited in our text at fn. 7, *ante*) as "[t]he most

striking instance of the exercise of this power of absolute disposition," and described the attendant circumstances: "By these laws the water-front line was fixed, cutting off from navigation a large area of . . . [tidelands and submerged lands] . . ., upon which line a sea-wall was constructed, and the area landward of this wall was subsequently surveyed into lots and streets, sold into private ownership and filled in for private use. This area now constitutes a large portion of the business section of San Francisco." The court then cited an array of cases which "recognize the authority of the state to make such absolute disposition of these particular lands" in the interests of navigation. The case cited included *Eldridge v. Cowell, supra,* 4 Cal. 80, and *Guy v. Hermance, supra,* 5 Cal. 73. (166 Cal. at pp. 585-586.)

From this comparative basis, the court spelled out its principal holdings: All tidelands and submerged lands conveyed pursuant to the general disposition program had passed from the State subject to the trust, and remained impressed with an easement for trust purposes, because none of the statutes enabling the program had indicated any legislative intent to promote, regulate or control navigation. (166 Cal. at pp. 586-592.) A purchase under these statutes therefore acquires the "soil" subject to the public's trust rights and the State's right to possess and use the lands for trust purposes. (P. 596.)

In the context of the trust purpose of navigation, "[t]he purchaser will not obtain the absolute ownership, unless *the public authorities, by erecting a sea-wall or otherwise improving the premises for navigation,* exclude his land or part thereof from public use and it becomes unnecessary for access or approaches thereto, *as in the case of the San Francisco water lots.* The public servitude will *then* be re-

moved from such excluded lands." (166 Cal. at p. 596 [emphasis added]. See also p. 599.) Until that happens, he may use the servient estate as he sees fit. (P. 599.) It does not happen when a "pierhead or bulkhead line" is merely "established" on the lands as the site of such wall. The tidelands and submerged lands in shore from the line remain subject to the use for the trust purpose until "erection of the wall.[11] (Pp. 599-600 [quoting *People v. Kerber* (1908) 152 Cal. 733, 737, and citing *People v. Williams* (1884) 64 Cal. 498].)

The court returned to the critical issue of underlying legislative intent by holding as follows: "When the state, in the exercise of its discretion as trustee has decided that portions of the tide land should be . . . excluded from navigation and sold to private use, its determination is conclusive upon the courts; but statutes purporting to authorize an abandonment of such public use will be *carefully scanned* to ascertain whether or not such was the legislative intention, and that intent must be *clearly expressed* or *necessarily implied.* It will *not* be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would *not* involve a destruction of the public use or an intention to terminate it in violation of the trust, *the courts will give the statute such interpretation.*" (166 Cal. at p. 597 [emphasis added].)

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11. We perceive in this language a clear holding that a State grant of tidelands, even if made under a statutory program which contemplates improvements *in aid of navigation*, does not operate to vest absolute title in a private grantee until the improvements are made. This means that absolute title vests when the trust is exercised on the lands, and not when the grant is made. (See *People v. Williams, supra*, 64 Cal. 498 at p. 499; *People v. Kerber, supra*, 152 Cal. 733 at pp. 736-737; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40.) Various writers have expressed divergent views on this point. (See Comment, *supra*, 21 UCLA L. Rev. 826 at pp. 844-845, fn. 90.)

According to the full impact of *People v. California Fish Co.*, tidelands acquired pursuant to the unrestricted general disposition program of the nineteenth century[12] are held subject to the tideland trust and the prospect of its exercise by the trustee. (See fn. 11, *ante.*) Due to the statutory patterns of the time as dissected above, the tidelands and submerged lands in San Francisco Bay were excepted from this broad reach of the decision. According to the language of *Knudson v. Kearney,* decided less than two years later, they were not affected by *People v. California Fish Co.* We reach *Knudson* at last.

The decision involved a dispute between two private parties concerning a small parcel of Alameda County shoreland located within the five-mile radius of the 1870 act. Against a complaint seeking to quiet title, the defendant pleaded his right to possession under a lease from a person who had "obtained title" in an 1873 grant from the Board of Tide Land Commissioners pursuant to the 1868 and 1870 acts. On appeal from a judgment for the defendant, the plaintiff contended that the grant had been inadmissible in evidence because "the state had no power thus to convey *absolute* title to the tide lands" (emphasis added) by reason of *People v. California Fish Co., supra,* 166 Cal. 576.

12. This reference is to the scheme in which the State disposed of tidelands pursuant to the successive statutes which emerged as sections 3440-3493 ½ of the 1872 Political Code. The program was substantially "unrestricted" until the people imposed limitations upon the use of tidelands, and their disposition by the State, in sections 2 and 3 of article XV of the California Constitution (now sections 3 and 4 of article X). We mention this because petitioners rely in part upon a retroactive effect claimed for either or both of the constitutional provisions added in 1879. Within the limited context of the present proceeding, in which the pertinent private titles originated prior to 1879, we do not reach this issue of retroactivity.

(*Knudson v. Kearney, supra,* 171 Cal. 250 at pp. 251-252.)

Rejecting this contention in less than two paragraphs, the *Knudson* court cited *People v. California Fish Co.* as authority for the State's power to terminate the tideland trust in aid of navigation; stated that the 1868 and 1870 acts had been "enacted in aid of navigation"; and cited decisions reached under the early San Francisco waterfront acts as authority for its conclusion, in the defendant's favor, that title had passed from the State to his lessor "in fee." (171 Cal. at pp. 252-253.)

We perceive no necessity for the summarized statements and, consequently, no authority in the conclusion. The decision itself indicates that the plaintiff was no more than a trespasser against whom the defendant claimed superior rights under his lessor's title. (171 Cal. at p. 251.) We have confirmed this, and have identified the essential issue as the right to possession of the land, by referring to pertinent portions of the briefs and record on appeal in the *Knudson* case.[13] The issue did not require a determination that the defendant's rights were based on an *absolute* title when the plaintiff was no more than an occupant of the property without right. (See Civ. Code, § 1006.) No question was presented as to whether the land was subject to a tideland trust interest held by the State, which was not a party to the case. The court's statements concerning the 1868 and 1870 acts, and the consequences of either or both, were accordingly dicta. As such, they do not support the

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13. We may do this in aid of distinguishing *ratio decidendi* from dictum. (See 6 Witkin, California Procedure (2d ed. 1971) Appeal, § 677, p. 4591 and cases there cited. See also fn. 3, *ante,* relative to judicial notice.) We have also done it in reviewing *Alameda Conservation Assn. v. City of Alameda, supra,* 264 Cal. App.2d 284.

order under review.[14] (*People v. Clark* (1941) 18 Cal.2d 449, 461; *Childers v. Childers* (1946) 74 Cal.App.2d 56, 61-62; 6 Witkin, Procedure, *supra,* Appeal, §§ 676-677, pp. 4589-4591.)

Alameda Conservation Assn. v. City of Alameda

On the question whether private titles to tidelands and submerged lands acquired under the 1868 and 1870 acts are held subject to the tideland trust, *Alameda Conservation* is not controlling because it strictly follows *Knudson v. Kearney.* Dicta remains dicta "no matter how often repeated." (*Childers v. Childers, supra,* 74 Cal.App.2d 56 at p. 62.) Two other cases cited by the *Alameda Conservation* court do not support its specific conclusions, nor do several other decisions which have cited *Knudson.* (Comment, *supra,* 55 Cal.L.Rev. 728 at p. 776, fn. 256.) Real parties in interest have argued that the *result* reached by the *Alameda Conservation* court should nevertheless control because it has independent validity apart from *Knudson.* It is true that the *Alameda Conservation* court had a tideland trust issue before it, that the State was a party, and that neither fact obtained in *Knudson.* We have pursued both facts in our examination of facts which are not shown in the *Alameda Conservation* decision but which appear in the briefs and the record on appeal in the case. (See fn. 13, *ante.*) Their details do not permit a summary, but the results of our examination have not persuaded us that the decision has the independent validity ascribed to it. We

14. This analysis disparaging the authority of *Knudson* has apparently not been made by any court. It has nevertheless been suggested. (See *County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 725, fn. 21 [characterizing a recent Supreme Court citation of *Knudson* as "a dictum" in itself]. See also Comment, *San Francisco Bay: Regional Regulation For Its Protection And Development* (1967) 55 Cal.L.Rev. 728, 776, fn. 256.)

disregard it accordingly. (See also *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; 6 Witkin, Procedure, *supra,* § 667, par. (1), p. 4580.)

The Titles Passed Under The 1868 And 1870 Acts

Since *Knudson* and *Alameda Conservation* do not control, the final question requires that we interpret the 1868 and 1870 acts independently of both decisions. The question is whether the Legislature intended the acts to effect a termination of the tideland trust as to the lands they reached. The answer does not require the strict scrutiny which *People v. California Fish Co.* exacts, and which the *Knudson* court did not make (see *People v. California Fish Co.,* quoted *supra,* 166 Cal. 576 at p. 597), because it is readily available from a contemporaneous legislative source. The bill proposing the 1868 act was referred to a special committee of the Assembly, to whom the Attorney General reported in writing. He flatly informed the committee, and through it the Legislature, that title to the lands proposed to be sold would pass subject to the tideland trust. (2 Appendix to Sen. and Assem. J. (17th Sess. 1868) pp. 5-6.)[15] The committee included his opinion with its report to the Assembly recommending passage of the bill. (*Id.,* pp. 3-10.) Such committee reports are a reliable source of the intent of the Legislature in enacting the measure reported.

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15. " . . . [T]he State may, through . . . properly appointed agents, preserving the mode laid down by her law-makers, vest the title of the State in others through the action of the Commissioners. The State, in making this disposition of those lands, passes the title with the same disability which obtains with the State. Her purchaser can acquire from the State no such title as will enable the owner or holder of them to use them to the detriment, destruction or prejudice of commerce or navigation. For such uses the public have an easement, and the Government retains and has the authority to enforce the right. . . ." (*Ibid.*)

(*Southern Pac. Co. v. Ind. Acc. Com.* (1942) 19 Cal.2d 271, 275; *People v. Swinney* (1975) 46 Cal.App.3d 322, 342.) We are aware of no source indicating that the 1868 Legislature did not have the Attorney General's advice in mind when it adopted the 1870 act two years later.

Moreover, there are substantive distinctions between the two acts which tend to show that the Legislature enacted them for different reasons. We have observed from the face of the 1868 act that it was designed to enable an extension of the San Francisco waterfront south of the point to which it had been developed pursuant to the earlier special acts affecting San Francisco only. (See fn. 9, *ante*.) Apparently for this reason, it closely followed the earlier acts by providing for the establishment of a waterfront "line" and for coordination of the inshore survey with the pattern of San Francisco streets. (Stats. 1867-68, ch. 543, § 4, p. 718.) In one of the first decisions involving the earlier acts, the coordination factor was relied upon by the court as an indication of the Legislature's intent to terminate the tideland trust forthwith. (*Eldridge v. Cowell, supra,* 4 Cal. 80 at p. 87; see Comment, *supra,* 21 UCLA L.Rev. 826 at p. 839 [text at fn. 58].) The appearance of the factor in the 1868 act imports that the Legislature intended a parallel effect.

No such purpose may be seen in the 1870 act, which ranged far across San Francisco Bay (see fn. 10, *ante*) but drew no "water front" line, directed the establishment of none, and was utterly silent on the subject of coordination with any community development in the affected area.[16] (See stats. 1869-70, ch. 388, § 2, p. 541.) Except for its passing provisions delegating the establishment of "canals

16. There was substantial community development, and some waterfront activity, along the East Bay shoreline in and before 1870. (Bowman, *Birthdays of Urban Communities* (1952) 31 Calif. Hist. Soc'y Quarterly 328.)

and basins . . . for . . . navigation and the wants of commerce" (*ibid.*), it may not be equated with the 1868 act in terms of either activity. It follows that the purpose of the 1870 act was not necessarily that of its predecessor.

Having drawn this substantive distinction, we have also found clear indications that the Legislature's real purpose in adopting the 1870 act was not the promotion of navigation, commerce, or any other purpose of the tideland trust. Sales of subdivided land pursuant to the 1868 act were a success. (Scott, The Future Of San Francisco Bay (Inst. of Govtal. Studies, U.C. Berkeley 1969) pp. 5-7); BCDC Supp., p. 430.) In his subsequent message to the 1869-70 Legislature, Governor H. H. Haight stated that its "results have been quite satisfactory," and that the revenues derived from it would provide a desirable source of support for the University of California. (Assem. J. (18th Sess. 1869) p. 49.) Other sources confirm that revenue, not the purposes of the tideland trust, motivated the Legislature to enter into the wide-ranging subdivision and the sale program embodied in the 1870 act, (Scott, *loc. cit.;* BCDC, *loc. cit.;* Comment, *supra,* 60 Cal.L.Rev. 225 at p. 252, fn. 79.)

In sum, we conclude that the titles conveyed to private grantees under both acts were passed subject to the tideland trust.

THE DETERMINATION RELATIVE TO COLLATERAL ESTOPPEL

As respondent court also made clear in its memorandum decision, it reached this determination upon the basis that the State's position in the *Alameda Conservation* case was contrary to the one it advances now. The determination was made *sua sponte*; real parties in interest had not urged it, and the parties apparently did not anticipate it. It occurs to us that any analysis of the State's position on the former

appeal presents a partial question of fact which does not permit this determination to stand under the summary judgment law. (Code Civ. Proc., § 437c.) A related problem arises because the court's determination disaffects the City of Berkeley, which was not a party in *Alameda Conservation.* These problems need not detain us. The essential issues in this proceeding are of sufficient public importance that the doctrine of collateral estoppel should not be applied against either petitioner. (See fn. 10, *ante;* Scott, *op. cit. supra,* pp. 6-8; *Marks v. Whitney* (1971) 26 Cal.3d 251, 257; *Chern v. Bank of America* (1976) 15 Cal.3d 866, 872.)

These conclusions remit us to petitioners' successive contentions, pleaded in their respective answers below, that the State's interest in the Berkeley tract, as its trustee, passed to the City of Berkeley under the 1913 grant from the Legislature. (See the text at fn. 6, *ante.*) We cannot reach this point because it involves factual matters not shown on real parties' motion for summary judgment. Among them is the fact that most of the tract has been filled at some unknown point in time since the 1870's. The fact raises substantial issues which depend upon when it was filled, by whom, and the attendant circumstances. (See *People v. Williams, supra,* 64 Cal. 498 at p. 499; *People v. Kerber, supra,* 152 Cal. 733 at p. 737; *People v. California Fish Co.,* quoted *supra,* 166 Cal. 576 at pp. 599-600. See also *City of Long Beach v. Mansell, supra,* 3 Cal.3d 462 at pp. 487-501.) Issues upon this fact have been joined in the pleadings. Those issues and others will be tried when the cause is remanded.

Let a peremptory writ of mandate issue as prayed.

CERTIFIED FOR PUBLICATION.

.....

Rattigan, J.

We concur:

.....

Caldecott, P. J.

.....

Wilson, J.*

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*Assigned by the Chairperson of the Judicial Council.

1 Civil 42466

APPENDIX "B-6"

Memorandum of Decision
(Superior Court for the County of Alameda
Endorsed Filed 4/29/77)

Appendix

Endorsed Filed—Apr 29 1977
Rene C. Davidson, County Clerk
By Maurine Evans, Deputy

In the Superior Court of the State of California
in and for the County of Alameda
Before the Honorable John P. Sparrow, Judge
Department No. 19

No. 422942

GEORGE W. MURPHY and SANTA FE LAND IMPROVEMENT COMPANY, a California corporation,
Plaintiffs,

vs.

CITY OF BERKELEY, a political subdivision of the State of California, and the STATE OF CALIFORNIA,
Defendants.

STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION,
Cross-Complainant,

vs.

SANTA FE LAND IMPROVEMENT COMPANY, a California corporation, GEORGE W. MURPHY; AND DOES 1 through 200, INCLUSIVE,
Cross-Defendants.

MEMORANDUM OF DECISION GRANTING PARTIAL SUMMARY JUDGMENT

Plaintiffs move for partial summary judgment on the ground that they own free and clear of the public trust for

commerce, navigation and fisheries 79 acres of former tide and submerged lands conveyed to their predecessors in interest pursuant to the Act of March 30, 1868 (Stats. 1867-68, p. 716) and the supplementary Act of April 1, 1870 (Stats. 1869-70, p. 541). The tract in question borders on the westward extension of University Avenue, west of the Eastshore Freeway in Berkeley and all but a fraction of an acre of it has been filled. Approximately one-third of the tract lies between the 1870 lines of mean high tide and mean low tide and the remainder as of that time was submerged land.[1] For the reasons hereinafter stated partial summary judgment is granted on the ground that the State's right, title and interest, including any public trust for commerce, navigation and fisheries was sold pursuant to the above statutes.

Case authority in California squarely holds that conveyances pursuant to the 1868 and 1870 legislative acts of tide and submerged lands in the San Francisco Bay area terminated the public trust for commerce, navigation and fisheries, to which such lands had previously been subject, with the consequence that private grantees received unencumbered fee title thereto as of the date the conveyances were made. *Knudson v. Kearney* (1915) 171 C. 250, *Alameda Conservation Assn. v. City of Alameda* (1968) 264 C. A. 2d 284.

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1. An oft-repeated concept which has seldom received critical examination is that tide land, i.e., property lying between the mean high tide line and the mean low tide line, is subject to the public trust, e.g., *Marks v. Whitney* (1971) 6 C. 3d 251, 259, on the theory that such was the common law, but cf., *Alien ability of the State's Title to the Foreshore* (1912) 12 Columbia Law Review 395 to the effect that this was not the common law rule and support to such a conclusion is lent by the fact that in Massachusetts, Maine and several other eastern states private ownership is recognized to the mean *low* tide line.

The 79 acres here in question were conveyed in 1871 to plaintiffs' predecessors in interest pursuant to the 1868 and 1870 Acts so that the above cases are binding on this Court under the principle of stare decisis. Moreover, in the Alameda Conservation Association case the State itself as a party successfully resisted a suit to enjoin the dredging and filling of a multi-acre tract of submerged land adjacent to the City of Alameda conveyed by the State in 1873 pursuant to the same statutory authorization as the tract here on the ground that the conveyance terminated the public trust. The State, therefore, is collaterally estopped to assert that the land here, in all respects analogous to that in Alameda, is subject to the public trust. Although use of estoppel here would be offensive in nature and one reported case condemns such a use, *McDougall v. Palo Alto School District* (1963) 212 C. A. 2d 422, later authority is to the contrary so that collateral estoppel may be used offensively as well as defensively. *O'Connor v. O'Leary* (1967) 247 C. A. 2d 646, 649-650, *Louie Queriolo Trucking v. Superior Court* (1967) 252 C. A. 2d 192, 194.

The State's reference to *Illinois Central Railroad Company v. State of Illinois* (1892) 146 U. S. 387, is inapposite. There, in precluding Chicago, a then existing municipality, from conveying its entire Lake Michigan waterfront, no enabling legislation similar to the Acts of 1868 and 1870 existed, nor unlike here was there any reservation of public trust rights over areas not conveyed. The City of Berkeley complains that its entire waterfront was similarly conveyed without reservation of public trust rights but unlike Chicago no City of Berkeley existed as of the date the conveyances here were made. The 1868 and 1870 Acts viewed the San Francisco Bay area as an entire unit and appropriate reservations for public rights of fisheries, commerce and

navigation were reserved in making conveyances pursuant to the overall scheme. In any event, the Berkeley Marina in fact provides public access to the bay from Berkeley as now constituted.

Defendants' contention that the conveyances in question were subject to an implied condition subsequent, that the lands were subject to a right of re-entry in the State if they were not reclaimed within a reasonable time from conveyance is without merit. Apart from the fact that the land in question has in fact been reclaimed, rights of re-entry, being in the nature of forfeitures, are never implied under circumstances where, as here, the conveyance of an unencumbered fee was manifestly intended. That such was the intent here is squarely held by the Knudson and Alameda Conservation Association cases above cited.

Article 15, ¶ 2 of the California Constitution has no relevance since it postdates the conveyances involved, nor does the 1913 grant by the State to the City of Berkeley of tide and submerged lands within its boundaries provide assistance to the defendants because the State could convey no better title to the City than it had itself and, having previously divested itself of any interest in the subject property, it follows that nothing passed to the City of Berkeley in 1913.

DATED: April 28, 1977.

JOHN P. SPARROW
John P. Sparrow, *Judge*

Supreme Court, U. S.
FILED
JUL 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-2008

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

SANTA FE LAND IMPROVEMENT COMPANY,
a California corporation,
Petitioner,

VS.

CITY OF BERKELEY, a political subdivision of the State of California, and the STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the federal questions presented by petitioner were not timely raised in the state courts, and where, as to one of the asserted federal questions, it is not within the ambit of 28 United States Code section 1257(3) and there are adequate independent state grounds for the state court's decision, does this Court have jurisdiction to consider such questions on a writ of certiorari?

2. Where issues remain to be tried on remand to the state trial court that could moot the federal questions presented, should this Court render what may be an advisory opinion?

3. Where a state has granted tidelands to private parties, does this Court's decision in *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, as a matter of federal common law, govern the nature of the title conferred upon the private parties by the state's deeds?

4. Where a state supreme court has confirmed that grants by the state to private parties of lands that lie beneath navigable waters passed a title that was subject to retained rights in the people under the public trust for commerce, navigation, and fishery, and in the course of so doing has rejected language in one of its earlier cases that was in conflict with state supreme court decisions rendered both before and after it, has the state supreme court thereby taken property in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

PARTIES BELOW

The proceeding below was for a writ of mandamus in the state appellate courts to review an interlocutory order of the superior court of Alameda County, which had granted a motion for partial summary adjudication made by Santa Fe Land Improvement Company and George W. Murphy, who are plaintiffs in the primary superior court action. In the writ proceeding, the City of Berkeley (hereinafter "City") and the State of California, acting by and through the State Lands Commission (hereinafter "State") were the petitioners. The respondent was the superior court of Alameda County. George W. Murphy and Santa Fe Land Improvement Company (hereinafter "Santa Fe") were the real parties in interest. Only the City, State, and Santa Fe are parties before this Court.

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SANTA FE LAND IMPROVEMENT COMPANY,
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CITY OF BERKELEY, a political subdivision of the State of California, and the STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENTS' BRIEF IN OPPOSITION

Respondents City of Berkeley and the State of California, acting by and through the State Lands Commission, hereby submit their joint brief in opposition to the petition for a writ of certiorari, which seeks review of the decision of the California Supreme Court in this case.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362], as modified at 26 Cal.3d 847a. The opinion of the California Court of Appeal is reported at 147 Cal.Rptr. 113.

JURISDICTION

Santa Fe seeks to invoke this Court's jurisdiction under 28 United States Code section 1257(3). For the reasons set forth below, this Court lacks jurisdiction to consider the questions raised in the petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Fourteenth Amendment to the United States Constitution and the state statutes referred to by Santa Fe, this case also involves article X, section 4 (formerly article XV, section 2) of the California Constitution. Article X, section 4 provides as follows:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Also involved, for purposes of the jurisdictional questions, is 28 United States Code section 1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . . . . .
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

A. Nature of the Proceeding Below

The instant case was commenced in 1972 in the superior court of Alameda County when Santa Fe sued the City in inverse condemnation concerning a parcel of predominantly filled land on the Berkeley shoreline, alleging that the City had unreasonably restricted development of the property by Santa Fe.

When the nature of its title was drawn into question by the City, Santa Fe brought the State into the action as a defendant by filing an amended complaint, which set forth additional causes of action in quiet title and declaratory relief. The State answered and cross-complained in quiet title and declaratory relief against Santa Fe, both as to the complaint parcel and as to additional lands along the Berkeley waterfront claimed by Santa Fe, the greatest portion of which were still covered by Bay waters. All of the property at issue was claimed by Santa Fe under deeds from the Board of Tide Land Commissioners. (See Cal. Stats. 1869-70, ch. 388, p. 541.)

Santa Fe moved the superior court for an order of partial summary judgment concerning title to the complaint parcel. On authority of *Knudson v. Kearney* (1915)

171 Cal. 250 [152 Pac. 541], the superior court determined that Santa Fe held absolute fee simple title to the property, and granted the motion.

This action by the City and State for a writ of mandamus to compel the superior court to vacate its order followed. The writ proceeding was first heard on the merits by the California Court of Appeal. That court issued an opinion distinguishing *Knudson v. Kearney* as dictum, holding that a public trust easement for commerce, navigation, and fishery existed in all of the tide and submerged land sold by the Board of Tide Land Commissioners, and directing that the writ issue. (147 Cal.Rptr. 113, 125.)

After denial of rehearing by the court of appeal, Santa Fe filed a petition for hearing with the state supreme court. The supreme court granted hearing and rendered the decision here challenged.

B. Tidelands Trust Law in California

From the early days of statehood, the California Supreme Court has recognized the special nature of the State's ownership, in trust for its people, of lands beneath navigable waters, and the special strictures and limitations upon the State's authority to administer such lands and to dispose of them to private parties. (See, e.g., *Eldridge v. Cowell* (1854) 4 Cal. 80, 87-88; *Ward v. Mulford* (1867) 32 Cal. 365, 372.) In *Ward v. Mulford, supra,* the supreme court stated:

> "[Tideland] is held by the State in trust and for the benefit of the people. The right of the State is subservient to the public rights of navigation and fishery, and theoretically, at least, the State can make

> no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them her grantee takes them upon the same terms upon which she holds them, and of course subject to the public rights above mentioned." (32 Cal. at p. 372.)

The limited character of any ownership of tidelands by private persons was confirmed by article XV, section 2 of the 1879 California Constitution (now article X, section 4), which provided that no private person "claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water . . . ."

In *People v. California Fish Co.* (1913) 166 Cal. 576 [138 Pac. 79], the supreme court rendered what is perhaps its most definitive and comprehensive treatment of the limits that the tidelands trust places upon the State in disposing of lands that it acquired by virtue of its sovereignty upon statehood. Under consideration in that case was a statutory sales program whereby approximately 80,000 acres of tideland had been sold to private parties by the State. The tideland patents purported to be dispositions of absolute fee title. In light of the trust strictures upon State disposition of such lands, the court construed the patents as conferring only a limited private title, one that was subject to a retained public trust easement in the public for trust uses. (166 Cal. at pp. 598-599.) The court did acknowledge that there were certain limited circumstances in which, where the Legislature's intent was

clear beyond question, the State might make an absolute disposition of such trust lands to private parties (166 Cal. at p. 597), but reiterated its earlier holdings that the mere delineation of a bulkhead line does not lift the trust over waters lying within that line. (166 Cal. at pp. 599-600; *People v. Kerber* (1908) 152 Cal. 731, 737, [93 Pac. 878]; *People v. Williams* (1884) 64 Cal. 498, 499 [2 Pac. 393].)

As articulated in *People v. California Fish Co.* and other California Supreme Court cases, a very strict test is applied, even where legislative intent is clear, in assessing whether any purported absolute disposition of tidelands is valid under trust principles: (1) there must exist a highly beneficial program in furtherance of trust purposes; (2) the lands to be freed of the trust must be merely a "residual portion" of the lands involved in the plan; (3) the lands must constitute a "relatively small parcel"; (4) the lands must have been rendered physically useless for trust purposes; and (5) the power of succeeding legislatures to administer the public trust over tidelands must not be impaired. (See, e.g., *People v. California Fish Co., supra,* 166 Cal. at pp. 585, 593-594; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40 [48 P.2d 20]; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 484-486 [91 Cal.Rptr. 23, 476 P.2d 423].)

C. Knudson v. Kearney

Prior to the decision below, both the courts and commentators have had a difficult time in harmonizing the above principles with the decision cited by Santa Fe, *Knudson v. Kearney* (1915) 171 Cal. 250. (See, e.g., *County*

of Orange v. Heim (1973) 30 Cal.App.3d 694, 712, fn. 15 [106 Cal.Rptr. 825]; Comment, *The Tideland Trust: Economic Currents in a Traditional Legal Doctrine* (1974) 21 UCLA L.Rev. 826, 844-845, fn. 90, 846, fn. 93; Comment, *California's Tideland Trust: Shoring It Up* (1971) 22 Hastings L.J. 759, 767; Comment, *San Francisco Bay: Regional Regulation For Its Protection and Development* (1967) 55 Cal.L.Rev. 728, 775-777.)

Knudson v. Kearney concerned a tideland sales program whereby, under statutes enacted in 1868 and 1870, some 22,299 acres of tide and submerged land in San Francisco Bay was auctioned off to private parties by an entity known as the Board of Tide Land Commissioners. The sales here in issue were made under the 1870 act. (Cal. Stats. 1869-70, ch. 388, p. 541.) In the act and in the subdivision maps prepared by the Board, there were passing references to "commerce and navigation". In isolated areas, "canals" were delineated on the Board maps. But in most areas, the Bay was subdivided into contiguous lots, no streets or canals were surveyed and reserved from sale, and no areas were set aside for docks, piers, or slips. Neither the act nor the Board maps made any provision for the actual construction of improvements in aid of either navigation or various other trust uses.

The State was not a party to *Knudson v. Kearney*, and the court could have affirmed the lower court judgment there without resort to a consideration of whether deeds issued by the Board of Tide Land Commissioners passed absolute fee title. (See California Court of Appeal decision below (147 Cal.Rptr. 113, 122).) The court nonetheless

stated that title to the deeded tide and submerged lands had passed to private parties in fee simple, free of any retained interests in the public.

D. The Decision of the California Supreme Court

The California Supreme Court in the case below determined that the tide and submerged lands deeded by the Board of Tide Land Commissioners under the 1870 act had passed private title, subject, however, to the same public trust easement that the court had found impliedly reserved by the tideland patents at issue in *People v. California Fish Co., supra,* 166 Cal. 576. The court so held on four independent grounds: First, it examined the 1870 act and its legislative history and determined that the clear and unambiguous legislative intent to terminate the trust required by *People v. California Fish Co.* was not present. (26 Cal.3d at pp. 525-531.) Second, it held that even if the Legislature had intended to terminate the trust, any such intent could not be given effect under trust principles because the conveyance of such a "vast area" of tidelands free of the trust would amount to "an improper abdication by the state of its role as trustee on behalf of the people." (26 Cal.3d at p. 531.) *Illinois Central Railroad v. Illinois* (1892) 142 U.S. 387, was cited with approval on this point. Third, the court ruled that *Knudson v. Kearney, supra,* could not legitimately have held that a "program for harbor development" contained in the 1870 act had legitimately terminated the trust, where, even 40 years after the grants, when *Knudson* was decided, the greatest proportion of the lands sold had not been developed in furtherance of the supposed program. To do so would be to perpetually impair the power of succeeding legislatures to

administer the trust for the public good, in the name of a purported program that had never been realized. (26 Cal.3d at pp. 531-532.) *Illinois Central* was also cited with approval on this point. Finally, the court concluded that *Knudson* was also wrong because "a number of cases had held or stated long prior to *Knudson* that a grant of tidelands, even if made for the improvement of navigation, does not vest absolute title in a private party until the improvements are actually made. (See, e.g., *People v. Williams* (1884) 64 Cal. 498, 499 [2 P. 393]; *People v. Kerber, supra,* 152 Cal. at pp. 736-737; *California Fish, supra,* 166 Cal. at pp. 599-600 [further citations omitted].)" (26 Cal.3d at p. 532.)

The question remaining for the court was whether to give its decision concerning the effect of the Board deeds full retroactive effect. The court noted that it had, in *People v. California Fish Co., supra,* given retroactive effect to a similar determination involving some 80,000 acres of tideland. It nevertheless chose to balance the competing public and private interests, deciding not to apply its holding retroactively as to filled lands that are substantially valueless for trust purposes. (26 Cal.3d at p. 534.) The court reasoned that tidelands that had neither been filled nor improved were the most suitable for continued exercise by the public of trust uses, whereas the loss to any private claimants who may have put misplaced reliance on *Knudson v. Kearney* was "speculative at best", given the strict regulatory controls over development of such tidal areas already exercised by state and federal authorities. There was no discussion concerning whether property was being taken without just compensation. The

court concluded by ordering the superior court to vacate its order "and to proceed in accordance with the views expressed herein."

SUMMARY OF ARGUMENT

On any one of a number of grounds, the petition should be denied.

There is no jurisdiction in this Court because the federal questions framed by Santa Fe were not timely raised below in accordance with state court rules of procedure. Because they were not timely raised, they were not decided below. Accordingly, this court lacks jurisdiction under 28 United States Code section 1257 to consider them.

Concerning the purported federal question involving a supposed mandatory application of federal common law by the California Supreme Court (allegedly evidenced by its citation with approval of *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387), there are several independent and adequate state grounds for the decision below, apart from the basis for decision that involves mention of *Illinois Central.* Under settled principles concerning this Court's lack of jurisdiction to render advisory opinions, this is an additional reason why there is no jurisdiction to consider this question. In addition, Santa Fe improperly invokes this Court's jurisdiction concerning this question because it does not fit within any of the categories of cases set forth in 28 United States Code section 1257(3), pertaining to this Court's jurisdiction to review state court cases on certiorari.

Neither is this case ripe for decision. By order of the state supreme court, the case must go back to the trial court for trial of various issues, such as whether there is an estoppel against assertion of the trust easement by the City and State, whether the property has been impliedly dedicated by virtue of public user, and whether the property has been inversely condemned by the City. Depending upon how these issues are disposed of, the federal questions that Santa Fe asks this Court to decide now could be mooted. This Court's discretion in such circumstances will be best exercised by a denial of the petition.

Concerning the substance of the supposed federal common law question raised by Santa Fe, an examination of this and past cases of the California Supreme Court readily demonstrates that *Illinois Central* has frequently been cited with approval in the course of the California Supreme Court's development of tidelands trust law. Neither in this instance, nor in any of the prior instances where that case has been cited, however, has the California Supreme Court done so under any supposed compulsion of federal common law principles. No question concerning the existence or application of "federal common law" was decided below.

Finally, the California Supreme Court has not taken Santa Fe's property in violation of the Fourteenth Amendment by rendering the decision below. The court merely confirmed, consistent with long-standing principles of California tidelands trust law, that the tideland deeds here in issue conferred a private title that was subject to a retained public trust easement in the public. The case relied

on by Santa Fe, *Knudson v. Kearney* (1915) 171 Cal. 250, was an isolated anomaly in the case law and was therefore rejected by the supreme court as inconsistent with the principles set forth in numerous other cases. In so doing, the court did not violate the Fourteenth Amendment.

In fact, the court was extremely solicitous concerning any reliance that may nonetheless have been placed upon *Knudson*, and limited its holding to unfllled lands that are still subject to the ebb and flow of the tides, thereby leaving unaffected by its decision the owners of tidelands that have been filled and improved. Thus, no investment-backed expectations were impaired such as would give rise to a taking under this Court's cases, even assuming that property can be "taken" by state court decisions that construe deeds.

Neither is Santa Fe justified in broadly claiming that the utility of its property has been "destroyed". Now, as it was prior to the decision below, Santa Fe is free to seek development permits for its tidelands from the appropriate state and federal regulatory agencies. Santa Fe does not allege that it has done so. Accordingly, its claim that its property has been taken by this decision is totally without any practical basis in fact.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Santa Fe Did Not Timely Raise Below Either of the Questions Presented in the Petition

This Court lacks jurisdiction to consider a federal question under 28 United States Code section 1257 unless that question was raised and decided below. (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 438.) In considering whether a

federal question was properly raised in a state court, state rules concerning the timeliness of issue presentation are determinative; and if state rules prohibit consideration of an issue because it was not timely raised, this Court may not consider the issue. (See *Beck v. Washington* (1962) 369 U.S. 541, 550-553; *Stembridge v. Georgia* (1952) 343 U.S. 541, 547 (where question was not timely raised under state practice because broached for the first time in a petition for rehearing in the intermediate state appellate court, no jurisdiction).)

Neither federal question presented by Santa Fe here was timely raised below.

The question concerning the existence of binding federal common law governing state administration of the tidelands trust was never raised by Santa Fe at any point, even in its petition for rehearing in the supreme court.[1] As set forth below, in citing *Illinois Central Railroad v. Illinois, supra,* with approval, the court was merely referring to principles which long ago were incorporated into California's tidelands trust law. There was absolutely no indication that the California court viewed *Illinois Central* as articulating principles of federal common law that were binding upon it.

Concerning the alleged violation of the Fourteenth Amendment by the State appellate courts in refusing to adhere to the language in *Knudson v. Kearney, supra,* that question was not timely raised when set forth for the

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[1]In its petition for rehearing, Santa Fe made passing references to *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, but only to argue that it should be distinguished. (Pet. for Reh., pp. 15, 22.)

first time in the petition for rehearing before the state court of appeal. (See *People ex rel. Dept. of Public Works v. Mascotti* (1962) 206 Cal.App.2d 772, 779-780 [23 Cal. Rptr. 846] ("It is the settled rule of this court that points made for the first time on petition for rehearing will not be considered."). Neither will the state supreme court on a petition for hearing review a question that was raised for the first time in a petition for rehearing in the court of appeal. (*Flores v. Stone* (1913) 21 Cal.App. 105, 111 [131 Pac. 348] (statement by state supreme court on denial of petition for hearing after decision by the court of appeal).) From the commencement of the writ proceeding, the disposition to be made of the supreme court's opinion in *Knudson v. Kearney, supra,* was a critical issue. The City and the State argued in their brief in supoprt of their petition for a writ of mandamus that *Knudson v. Kearney* should be rejected as precedent. (Pet. for Writ of Mandamus with Supporting Memo. of Pts. & Auths., pp. 5, 17-18, 25, 77-80.) Santa Fe's Fourteenth Amendment issue was not timely raised on petition for rehearing after the court of appeal had rendered its decision. The issue was properly disregarded by the supreme court.

II. This Court Lacks Jurisdiction to Consider the Federal Common Law Question for the Additional Reasons That There Are Adequate Non-Federal Grounds for the Decision Below and That the Question Does Not Involve a Right Claimed Under the Constitution, Treaties or Statutes of the United States

As set forth in the statement of the case above, there were three other independent bases for the state supreme court's decision, in addition to the ground for decision

that is quoted at page 11 of the petition. Even conceding for purposes of argument that this latter basis for the decision involved a federal question, a determination of that question by this Court would have no effect on the decision below. For instance, the first and principal ground for the supreme court's decision was its determination that the 1870 California Legislature had not intended to terminate the tidelands trust over the lands authorized to be sold. That led to the conclusion that the trust had not been terminated, a conclusion based solely on the strong language in *People v. California Fish Co., supra,* 166 Cal. 576, 597, that a legislative intent to terminate the trust "will not be implied if any other inference is reasonably possible," and that "if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation."

This Court has no jurisdiction to render advisory opinions, and if, by virtue of the existence of adequate nonfederal grounds for the state court decision, the same judgment would still issue from the state court after this court disposed of the federal question, there is no basis for the assumption of jurisdiction under 28 United States Code section 1257. (*Herb v. Pitcairn* (1945) 324 U.S. 117, 125-126.)

Further, the purported federal common law question does not come within any of the various grounds set forth in subdivision (3) of section 1257 for the review of state court judgments on certiorari. The question presented by Santa Fe does not involve the calling into question of the

validity of a treaty or statute of the United States; it does not involve the validity of a state statute drawn in question as being repugnant to the Constitution, treaties or laws of the United States; and it does not involve "any title, right, privilege or immunity . . . specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." According to Santa Fe, all the supreme court did was mistakenly consider itself bound as a matter of federal common law to follow *Illinois Central Railroad v. Illinois, supra,* concerning disposition of state trust lands lying beneath navigable waters. Even if true, that would not give rise to a federal question within the certiorari jurisdiction set forth in section 1257(3).

III. The Questions Presented Should Not Be Considered by This Court at This Time Because They May Be Mooted by the Further Proceedings That Are Necessary in the Trial Court on Remand From the State Supreme Court

The issue of the nature of the private title inhering in the tidelands deeded by the Board of Tide Land Commissioners was only one of several issues presented for decision in the case that is still pending in the superior court of Alameda County. Disposition below of these remaining issues could moot any federal questions. In the superior court action below, for instance, Santa Fe alleges that the City and State are estopped to assert any trust title in the subject property by virtue of certain alleged conduct upon which Santa Fe or its predecessors relied to their detriment. (Santa Fe complaint, pp. 4-6; Santa Fe answer to State's cross-complaint, p. 5.) Such alleged conduct has yet to be the subject of an evidentiary

trial and was not the subject of the writ action in the appellate courts. The City and State are strenuously resisting Santa Fe's estoppel claim, but should Santa Fe prevail on the trial of the estoppel issue, the questions decided in the writ proceeding will be mooted because Santa Fe will have established that it has fee title to the subject property, independent of the determination below that title originally passed in the 1870's subject to the public trust easement. Further, the City and State have alleged below that the property claimed by Santa Fe has been impliedly dedicated for certain purposes by virtue of public user. (See State's cross-complaint, pp. 5-6; *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 [84 Cal.Rptr. 162, 465 P.2d 50].) There is also the primary issue of inverse condemnation to be resolved.

There is no point in this Court rendering a decision now in this case which could be deprived of any practical effect by subsequent proceedings in the trial court. If, in the future, a case is presented where such federal questions are presented in a context that forecloses any possibility of such questions being mooted by further state court proceedings, that will be time enough for this Court to consider them. This is a case where it is "desirable to wait and see," and where it is therefore appropriate to refuse a grant of certiorari. (See *Darr v. Burford* (1950) 339 U.S. 200, 227 (Frankfurter, J., dissenting).)[2]

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[2]The Court may also wish to consider whether the decision below is truly "final" for purposes of exercising jurisdiction under 28 United States Code section 1257. It is the general rule that a decision, to be regarded as final, must be final as to all the causes of action involved and must not be merely an interlocutory or intermediate step in the litigation. (*Market Street R. Co. v.*

IV. There Is No Basis for Santa Fe's Assertion That the California Supreme Court Decided a Federal Question Merely by Citing a United States Supreme Court Case With Approval

From the simple fact that the supreme court cited *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, with approval, Santa Fe fabricates a phantom holding by the court that it was bound, as a matter of federal common law, to rule as it did concerning whether San Francisco Bay tide and submerged lands could be sold to private parties free of the public trust eastment for commerce, navigation, and fishery. There is absolutely no language in the court's opinion—anywhere—that indicates it made any such determination. Neither at the points in the opinion where *Illinois Central* is cited, nor at any other point does the court use the terms "federal common law", or "bound", or "binding", or any variant of these terms.

The court was simply doing what it has done many times in the past: citing *Illinois Central* with approval on an

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Comm'n (1945) 324 U.S. 548, 551; *Collins v. Miller* (1920) 252 U.S. 364, 370.) None of the exceptions to this rule set forth in *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 477-485, are applicable here. Admittedly there are some cases of this Court which arguably treat writ proceedings such as that below as separate actions that are to be tested for finality independent of the pendency of the unresolved primary actions out of which they arise. (But see *Grays Harbor Co. v. Coats-Fordney Co.* (1917) 243 U.S. 251, 255-256.) But given the fact that the writ of mandamus in California performs a function similar to that of an interlocutory appeal in other states, it may be appropriate to treat such writ proceedings, when used in this fashion, as not yet final, just as decisions on interlocutory appeals are regarded as not being final. (See *Whitus v. Georgia* (1967) 385 U.S. 545 (disposition of interlocutory appeal not regarded as final order).)

issue of public trust law, in recognition of that case's conceded status as the "lodestar" case in American law concerning its articulation of principles relating to public rights in navigable waters. (See Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention* (1970) 68 Mich.L.Rev. 471, 489.) *Illinois Central* consumes ten columns in Shepard's Citations. Many of the citations to it are contained in the decisions of state courts throughout the country. This only represents the common disposition of courts to follow as persuasive, but not as binding law, the decisions of courts from other jurisdictions, particularly when the decisions are those of this Court or of other federal or state courts of national reputation.

Illinois Central was early accepted by the California Supreme Court as an articulate statement concerning public trust rights in navigable waters and therefore woven into California law on the subject. (See, e.g., *Bolsa Land Co. v. Burdick* (1907) 151 Cal. 254, 262 [90 Pac. 532]; *Forestier v. Johnson* (1912) 164 Cal. 24, 30 [127 Pac. 156] ("Similar statements concerning this subject have been made by this Court," citing, inter alia, *Eldridge v. Cowell, supra,* 4 Cal. 80); *People v. California Fish Co., supra,* 166 Cal. 576, 584, 585; *Boone v. Kingsbury* (1928) 206 Cal. 148, 196 [273 Pac. 797].) By simply continuing, in this case, its recognition of *Illinois Central* as persuasive authority, the California Supreme Court did not thereby apply that case as binding federal law.

V. The Decision of the California Supreme Court, in Confirming That Tideland Deeds Conveyed a Private Title Subject to Retained Public Rights, and in Limiting Its Holding to Lands That Are Still Water-Covered, Did Not Take Private Property in Violation of the Fourteenth Amendment

As set forth above, the law was anything but clear concerning the nature of the title that passed to private parties by virtue of the deeds to tide and submerged lands issued by the Board of Tide Land Commissioners. The conflicts in the cases, the confusion of the commentators, the facts that the State was not a party to *Knudson v. Kearney, supra,* and that *Knudson* need not have reached the public trust issue; all served to vitiate any supposed reliance on *Knudson* as a definitive statement on the nature of title conferred by the Board deeds. Further, the contemporaneous opinion of the California Attorney General at the time of the 1870 act's passage was that title would go out subject to retained public rights. (See 26 Cal.3d at pp. 529-531.) Further, the provisions of article XV, section 2 of the California Constitution (now article X, section 4) made quite clear that claimants of tidelands held those lands subject to overriding rights in the public. Even a title report obtained on the very property here in issue contained an exception for the public trust rights that Santa Fe says were imposed for the first time in the decision below. (See City and State's Replication to Answer to Pet. for Writ of Mandamus, pp. 8-10.) Against this background, it cannot be said that *Knudson* had acquired "rule of property" status.

Further, in construing the effect of a deed, a court does not take property in violation of the Fourteenth Amendment when it disapproves ill-considered language on the issue from an earlier decision. Cases may be overruled and dicta disapproved without violating the due process or contracts clauses of the United States Constitution. (*In re L.A. County Pioneer Society* (1953) 40 Cal.2d 852, 865 [257 P.2d 1].) The two holdings cited by Santa Fe, those in *Muhlker v. Harlem Railroad Co.* (1905) 197 U.S. 544, and *Appleby v. City of New York* (1926) 271 U.S. 365, both related to impairment of the obligations of contracts by state statutes, in violation of Article 1, Section 10 of the United States Constitution; the cases did not relate to alleged deprivation of due process by state courts in violation of the Fifth and Fourteenth Amendments.

Despite the above considerations, and despite the fact that there clearly could have been no private reliance upon *Knudson v. Kearney* prior to that decision's rendition in 1915, the supreme court nonetheless dealt with the question of possible reliance upon *Knudson* in its decision. In applying its construction of the Board deeds, the court chose not to apply its decision to lands that had been filled and improved, and where significant investments may therefore have been made in reliance on the disapproved case. Instead, it ruled that the tidelands trust easement still applied only to those lands that were still covered by the waters of San Francisco Bay over 100 years after the deeds issued. Under settled California law, such lands were already, prior to the decision below, subject to a navigational easement in the public. (See, e.g., *Bohn v. Albertson* (1951) 107 Cal.App.2d 738 [238 P.2d 128].) In short, the

court's decision did not impair reasonable investment-backed expectations. The court characterized any economic detriment as "speculative at best". (26 Cal.3d at p. 535.) This same type of analysis has been used by this Court where a taking issue is truly presented under the Fourteenth Amendment. (See *Kaiser Aetna v. United States* (1979) 444 U.S. 164, ... [100 S.Ct. 383, 390].)

Further, Santa Fe's broad assertion that the decision has "destroyed the utility" of the deeded property that lies beneath Bay waters is advocates' hyperbole; it is not fact. Placement of improvements in the Bay is regulated by both the San Francisco Bay Conservation & Development Commission (BCDC) and the Corps of Engineers. Both the McAteer-Petris Act creating BCDC and BCDC's San Francisco Bay Plan allow for private development in the Bay, as long as the proposed development is consistent with the special value and utility of tide and submerged lands. (See Cal. Gov. Code, § 66600, et seq.) Similarly, the Corps of Engineers has and will permit appropriate private projects in Bay waters. Santa Fe does not allege that it has made application to either of these bodies for permission to develop its property. Santa Fe's assertion of a taking is therefore groundless; at best, it is premature. (See *Agins v. City of Tiburon* (1980) ..... U.S. ....., ... [100 S.Ct. 2138, 2141, 2142] (no taking where zoning ordinance valid on its face and landowners had not submitted a development plan to the City).)

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated, July 17, 1980

Respectfully submitted,

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No. 79-2008

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

SANTE FE LAND IMPROVEMENT COMPANY,
a California corporation,
Petitioner,

vs.

CITY OF BERKELEY, a political subdivision of the State of California, and the STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION,
Respondents.

REPLY MEMORANDUM FOR THE PETITIONER

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No. 79-2008

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

SANTA FE LAND IMPROVEMENT COMPANY,
a California corporation,
Petitioner,

VS.

CITY OF BERKELEY, a political subdivision of the State of California, and the STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION,
Respondents.

REPLY MEMORANDUM FOR THE PETITIONER

Respondents City of Berkeley and State of California have predicated their opposition to the substantive issues raised by the petition for certiorari filed by petitioner Santa Fe exclusively upon procedural grounds. They maintain that Santa Fe did not timely raise the two federal questions below; that there were potential alternative state grounds for the California Supreme Court's decision on the federal common law question; and that the pendency of further proceedings in the trial court may render the federal questions moot. The purpose of this reply is to point out that each of the foregoing assertions is incorrect.

1. Petitioner Raised the Questions Presented at Each Level of the Proceedings Below

Santa Fe initially raised the two questions presented by the petition in its amended complaint filed on February 5, 1976, and in its answer to the state's cross-complaint filed on May 14, 1976. By those pleadings, it asserted that the State of California possessed the power to convey the property at issue into absolute private ownership free of the public trust for commerce, navigation and fishing. (Amended Complaint at 3.) It also alleged that by seeking to impress the subject lands with the public trust for commerce, navigation and fishing, the city and state sought to take Santa Fe's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. (Amended Complaint at 8-10.)[1]

Following Santa Fe's successful motion for summary judgment in the trial court, the city and state filed a petition for writ of mandamus in the court of appeals seeking to set aside the trial court's order. In its "Answer to Petition for Writ of Mandamus and Memorandum of Points and Authorities in Support Thereof," filed January 25, 1978 [hereafter referred to as "Answer to Writ"], Santa Fe again raised the two questions presented. In particular, Santa Fe contended that the State of California had the absolute power to convey the lands at issue into private ownership and that the principles set forth in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S.

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[1]The constitutional questions were also raised by the seventh and ninth affirmative defenses in Santa Fe's answer to the cross-complaint of the State.

387 (1892), were not applicable in that state law not federal law governed.[2] Similarly, Santa Fe raised the argument that reversal of *Knudson v. Kearney,* 171 Cal. 250 (1915), would effect a taking of its property in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.[3]

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[2]Santa Fe asserted that:

> "The power of the State to control, regulate and utilize its navigable waterways and the lands lying beneath them, is absolute, except as limited by the supervisory power of the federal government over navigable waters. *Coldberg, Inc. v. State of California ex rel. Dept. of Public Works,* (1967) 67 Cal.2d 408, 416. The State's power includes the right to irrevocably dispose of any portion of said lands and to terminate the public trust. (citations omitted)." (Answer to Writ at 9-10)

. . .

Santa Fe further argued that:

> "Petitioners rely upon the decision of the United States Supreme Court in *Illinois Central R. Co. v. State of Illinois,* (1892) 146 U.S. 387, for the proposition that the subject conveyances were invalid because their alleged effect was to substantially impair the public's interest in, and governmental control over, tide and submerged lands. At the outset it should be noted that state law, not federal law is applicable herein. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel* (1977) 97 S.Ct. 582; *Shively v. Bowlby* (1894) 152 U.S. 1. Hence, any inference that the *Illinois Central* case enunciates some overriding federal principles that are applicable here is incorrect. . . ." (Answer to Writ at 32.)

[3]Santa Fe argued:

> "The State's attempt to subvert the law as set forth in the *Kundson* and *Alameda Conservation Association* cases by depriving Santa Fe and Murphy of title to the land in question, clearly impairs the obligation of contracts (United States Constitution, Article I, Section 10). It would further deprive them of their property in violation of the due process clause of the

In its petition for a hearing before the California Supreme Court filed on August 8, 1978, Santa Fe once again raised the questions presented in this proceeding. Santa Fe asserted that the State of California through its legislature had the power to "dispose absolutely of lands beneath navigable waters" (Petition for Hearing at 14 and 21) and that for the state supreme court to reverse *Knudson v. Kearney* would be to deprive Santa Fe of its property without due process in violation of the Fourteenth Amendment of the United States Constitution. (Petition for Hearing at 22-23.) Again, the same arguments were made in Santa Fe's petition for rehearing following the decision of the California Supreme Court below.

2. The Decision Below Decided the Federal Common Law Question Presented Which Is Reviewable by This Court Under 28 U.S.C. § 1257(3)

Respondents do not claim that the question presented as to the taking of Santa Fe's property without due process, in violation of the Fourteeenth Amendment to the United States Constitution, does not constitute a federal question. However, respondents do contend that the California Supreme Court's reliance upon the restrictions expressed in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892) as the basis for its decision does not give rise to a federal question. The arguments advanced by respondents in support of this contention are without merit.

As more fully set forth in the petition, the California Supreme Court construed this Court's decision in *Illinois*

Fourteenth Amendment of the United States Constitution. *Appleby v. City of New York,* (1926) 271 U.S. 364, 381, 397-402. . . ." (Answer to Writ at 47.)

Central, supra, as imposing restrictions upon California's ability to convey tidelands into private ownership. In so holding, the state supreme court necessarily concluded that the doctrine announced in *Illinois Central* represents a federal common law limitation upon the otherwise unfettered authority of states to develop their own rules governing lands underlying navigable waters. To the extent that conclusion directly conflicts with this Court's decision in *State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977) and the Equal Footing Doctrine, the existence of a federal question is self-evident.

Respondents argue that the California Supreme Court's failure to use terms such as "bound" or "binding" in its reference to *Illinois Central* indicates that it did not rely upon that decision as the basis for its decision and, therefore, the decision is not based upon the state court's construction of federal law. However, a brief review of the decision below demonstrates that the court's reliance on the doctrine announced in *Illinois Central* could not be more explicit:

> "There were limitations imposed by this ancient doctrine [the public trust] upon the alienation of tidelands to private parties. *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387 (36 L.Ed. 1018, 13 S.Ct. 110) was the seminal case on the scope of the public trust doctrine and remains the primary authority even today, almost nine decades after it was decided. *The decision established the principle that a state, as administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties.*" (Emphasis

added.) *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521 (1980) (emphasis added).

Respondents advance two additional alternative contentions which assume the existence of a federal question. First, respondents claim that the issue raised by the California Supreme Court's implementation of the *Illinois Central* doctrine does not come within this Court's certiorari jurisdiction as set forth in 28 U.S.C. § 1257(3) because it does not involve any title, right, privilege or immunity set up or claimed under the Constitution, treaties or statutes of the United States. Respondents miss the point. The question is whether, by concluding that there is an overriding federal principle restricting the ability of the state to convey tidelands into private ownership, the California Supreme Court erroneously limited the right of the state to develop its own rules of property governing lands received by reason of its sovereignty. This right arose by reason of the Equal Footing Doctrine and is a question clearly reviewable by certiorari, pursuant to 28 U.S.C. 1257(3), as being a right arising under the Constitution of the United States. *State Land Board v. Corvallis Sand & Gravel Co., supra; Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

Finally, respondents urge that there are adequate nonfederal grounds for the decision below and, therefore, the California Supreme Court's reliance on *Illinois Central* is irrelevant to the court's decision. In particular, respondents argue that "the first and principal ground for the supreme court's decision was its determination that the 1870 California legislature had not intended to terminate

the tidelands trust over the lands authorized to be sold." [Respondent's Brief in Opposition, filed July 18, 1980, at 15.] Respondents' contention that the state court relied upon its construction of the legislative intent in enacting the 1870 legislation as an independent basis for the decision below is flatly contradicted by the language of the decision itself:

> "*Knudson* was incorrectly decided even if the court had been justified in concluding that the purpose of the 1870 Act was to promote navigation. *Illinois Central* holds that a state may not grant to private persons tidelands as vast in area as the board was authorized to sell by the 1870 Act."
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> *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 531 (1980).

It is clear that the decision of the California Supreme Court was based upon its belief that *Illinois Central* limits the power of the state to develop its own rules of property authorizing conveyance of tidelands into private ownership. Its conclusion that *Knudson v. Kearney*, 171 Cal. 250 (1915), did not comport with the federal restrictions imposed upon California by *Illinois Central* led it to overrule its prior decision. Thus, the court determined a federal question reviewable by this Court pursuant to 28 U.S.C. 1257(3).

3. The Decision of the California Supreme Court Must Be Reviewed at This Time Notwithstanding Possible Further Proceedings in the Trial Court

Respondents argue that the possible pendency of further proceedings in the trial court renders assumption of

jurisdiction by this Court premature. Their contention is premised upon the fact that Santa Fe has raised the questions of whether or not the state and city are estopped to assert that Santa Fe does not own its lands in fee simple and that Santa Fe has made a claim for inverse condemnation based upon the City of Berkeley's utilization of restrictive zoning to deny Santa Fe any reasonable use of its property.[4]

Respondents do not contend, nor can they, that the decision of the California Supreme Court is not final for purposes of review under 28 U.S.C. § 1257. As noted by Santa Fe in its petition for a writ of certiorari [filed June 19, 1980, at 2, n. 1] the decision below arose from an extraordinary writ proceeding separate and distinct from the underlying trial court action. The decision of the court below is final as to the issues resolved by the writ proceeding and there are no further matters to be considered by the trial court in that regard. This Court has repeatedly held that a decision by the highest state court on an extraordinary writ is a final judgment within the meaning of 28 U.S.C. § 1257 and properly the subject of certiorari review. *Detroit & M.R. Co. v. Michigan R. Com.*, 240 U.S. 564 (1916); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928).

Even if the mandate proceeding out of which the California Supreme Court decision arose was not separate and

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[4]The inverse condemnation claim arises not by reason of the decision of the California Supreme Court, but rather, by reason of the City of Berkeley's refusal to zone Santa Fe's property for any use. That claim has nothing to do with the decision of the court below.

final for all purposes, the decision below is clearly reviewable at the present time under the standards established by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox* this Court held that it will exercise jurisdiction over cases in which subsequent review of an adjudicated federal claim may be impossible after final disposition of the proceedings still to be conducted in the state trial court. This Court in *Cox* described such a situation:

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.* The Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts." (Emphasis added.)
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> *Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 481.

This is the identical situation confronting Santa Fe in this proceeding. As respondents point out, if Santa Fe were to prevail in the trial court on the issue of estoppel the federal claims would be moot. Conversely, if Santa Fe were to lose on the merits, California state law would prohibit subsequent review of the federal questions presented since the ruling of the California Supreme Court would become the "law of the case" and would be binding

upon all future trial and appellate proceedings. *Tally v. Ganahl,* 151 Ct. 418 (1907). As a result, Santa Fe would be prohibited from again presenting its federal claims to the California Supreme Court for review following the trial court's final judgment. This Court has held that a subsequent refusal by a state appellate court to review a federal issue on the ground that its earlier decision became the law of the case constitutes an independent state ground precluding this Court's assumption of jurisdiction over the federal questions originally presented. *Rio Grande Western R. Co. v. Stringham,* 239 U.S. 44 (1915).

Review by this Court of the decision below at this time, rather than being premature, is required. If Santa Fe were to await conclusion of the remaining trial court proceedings, it would most likely be barred from seeking review of the federal questions presented by its petition here. The further proceedings to be conducted in the trial court are wholly unrelated to the federal questions presented and the trial court's resolution of the remaining issues can have no effect upon the federal questions already decided by the California Supreme Court.

Respectfully submitted,

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